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Section 1.—Early History.

1. Long before the Court of Session came into being, attempts had been made to have established a Supreme Civil Court in Scotland, for, from early times, the administration of justice had been left in the hands

of sheriffs of counties and bailies in burghs without defined limitations. Appeals from these functionaries to Parliament and to the King's Council were competent; and appeals also were taken from judgments of bailies to the Justiciar (Justice-General) and to the Chamberlain Aires when the Justiciar and the Chamberlain went on their respective circuits, and from them appeals could be taken to Parliament or the King's Council. In order that the King and Parliament might not be unduly burdened with judicial work, provision was from time to time made to place the Courts of inferior jurisdiction on a firm basis, and in 1424, by the Act 12th March, it was enacted: "Item—Anents billes of complaints, the quhilkis may not be determined be the Parliament, for divers causes belanging the commoun profite of the realme, It is ordained that the billes of complaints be execute and determined be the judges and officiares of the Courts to quham they pertain of law; outher justice, chalmerlane, schireffes, bailies of burrowes, barrons, or uthers spirituall judges gif it effeiris to theme. To the quhilkis judges, all and sindrie, the King sal give strait commandement, alsweil within regalities as outwith, under all paine and charge that after may follow, that alsweil to pure as to rich, bot fraud or favour, they doe full law and justice." Further to relieve the King and Council from judicial work, there was instituted the appointment of Lords Auditors, elected at the commencement of each session of Parliament for the hearing and deciding of causes and for reviewing the decisions of inferior judges during the sitting of Parliament. Another expedient for the same purpose was the nomination of certain Lords as Lords of the Session, who heard and determined causes when Parliament was not sitting.[1]

2. In 1503 the Court known as the "Daily Council" was established [2] —"that thair be ane Counsale chosin be the King's Hienes, qlk. sall sitt continually in Edinburgh or quhar the King makis residence, or quhar it pleses him, to decide all manner of summondes in civil materis complants and causes dayly as thai sall happin to occur, and sall have the samen power as the Lordis of Sessioun." In 1524 resort was again made to the services of the Lords of the Session.[3] Ultimately the College of Justice was established in 1532.[4] The Act of that year, chap. 2 of the Parliament 13th May 1532, intituled "Concerning the ordour of Justice and the institutioun of ane College of cunning and wise men for the administratioun of Justice," provided for the institution of the College as follows: "Item—Anent the secund artikle concerning the ordour of justice, because our Soverane is maist desyrous to have ane permanent ordour of justice for the universale wele of all his lieges, and tharfor tends to institute ane College of cunning and wise men, baith of spiritual and temporale estate, for the doing and administratioun of justice in all civil actions, and tharfor thinks to be chosin certane persones maist convenient and qualifit tharfor to the nowmer of xiiii persons, half spiritual half temporal,

[1] Act, 11th March 1424.
[2] Act 1503, c. 38.
[3] Act, 16th November 1524.
[4] Act, 17th May 1532.

with ane Presedent: The quhilk persons sal be auctorizat in this present Parliament to sitt and decyde upon all actiouns civile, and nane utheris to have voit with thaim on to the tyme that the said College may be institute at mare lasare."

3. On 27th May 1532 the Court as newly established held its first meeting in presence of the King and passed the Act of Sederunt issued on that date, which was signed by His Majesty himself. The assembly went into very minute details in providing for the administration of justice under the new regime, as, for example, the making of seats and a board or table "quadrangulare or round, about the quhilk thair may sitt xviij personis eselie," also the fixing of a bell—"and ane bell to be hungin to call in masaris or parteis as the Lordis requiris."

4. Founded on the model of the French Parliaments, the designation "College of Justice," and also the title "senators," applied to the judges in the ratifying Act of 1540 would appear to have been more ambitious than the circumstances of the time warranted, for the Court had not even a habitation of its own and sat by permission of the Town Council in a mean apartment of the then ruinous Old Tolbooth of Edinburgh. In this connection it is worth noting that the differentiation between "Outer House" and "Inner House" was in use long before the College of Justice took up quarters in the premises built round and about Parliament Hall. The Parliament Hall was not completed until the year 1640, but the terms were in existence when the Old Tolbooth still harboured the College of Justice and its senators. Thus, an Act of Sederunt, dated 11th January 1604, was passed to remedy the inconvenience experienced through the "Inner Hous" and "Utter Hous" sitting at the same time, while as far back as 1484 one can find reference made to "Inner and Outer Tolbooth." When eventually the Court flitted to Parliament Hall a similar partition was kept up. Although it is certain the Court of fifteen judges, or a quorum, sat as one tribunal, two or more judges, it would seem, were detached, as required, for Outer House duties, and sat, not within the Court Room, but in the Parliament Hall.

5. As provided by the statute of 1532, the Court (excluding the President) was composed of judges one-half spiritual and one-half temporal; but in 1584 and, later, in 1640 ministers were by statute precluded from being of the Lords of Council and Session, and from the latter date the fifteen judges were temporal. In 1830 the number of judges was reduced to thirteen,[1] but prior to this reduction the Court had, in 1808, been divided into two Divisions.[2] By the 1808 Act it was provided that the First Division should consist of the Lord President and seven of the Ordinary Lords of Session, and the Second Division should consist of the Lord Justice-Clerk and six of the Ordinary Lords. The number of judges in the two Divisions was reduced to the present number, four in each Division, by the Court of Session Act, 1825,[3] the

[1] 1 Will. IV. c. 69, s. 20. [2] 48 Geo. III. c. 151, s. 1. [3] 6 Geo. IV. c. 120, s. 1.

other seven judges being detached to form the Outer House. The First Division was declared to consist of the Lord President and three judges, and the Second Division of the Lord Justice-Clerk and three judges. The reduction to thirteen operated by the 1830 Act fixed the number of Outer House judges at five instead of seven, and five is the present number. The quorum of each Division is three,[1] but four judges must sit in applications for execution pending appeals to the House of Lords, or in applications involving questions as to interim possession and payment of costs pending such appeals.[2]

Section 2.—Modern Administration.

Subsection (1).—*Sittings of Court.*

6. The Court sits for the winter session on 15th October (except when the 15th falls on Sunday or Monday), adjourns for two weeks' recess at Christmas, usually adjourns for one week in February, and rises for spring vacation on 20th March (or one or two days earlier should the 20th be Sunday or Monday). The summer session starts on 12th May (except when the 12th falls on Sunday or Monday) and ends on 20th July (or one or two days earlier should the 20th be Sunday or Monday).[3] Extension of the sittings of the whole Court or a section or sections thereof, not exceeding two months in a year, may be made by Act of Sederunt.[4] In autumn vacation, Christmas recess, and spring vacation, civil jury trial sittings are held, the Lord President and the Lord Justice-Clerk officiating, assisted, if necessary, by other judges.[5] On Whitsunday and Martinmas term days the Court (except the Lord Ordinary on the Bills) does not sit, and the Court offices (except Bill Chamber) are closed. Blank days in the Outer House were abolished by the Court of Session Act, 1868,[6] but each Lord Ordinary was required to set apart one day per week for proofs or jury trials. Now proofs and trials may be taken any day.[7]

Subsection (2).—*Inner House.*

7. The First and Second Divisions exercise the same jurisdiction, the only difference in detail being made by arrangement. For example, the First Division now takes all Exchequer appeals and cases and all applications for admission as a notary public, and the Second Division deals with applications for admission to the Poors Roll. Should the state of business so require, an Extra Division may from time to time be formed to dispose of cases standing in the rolls of the First and Second Divisions. The Extra Division, when it sits, is composed of three judges.

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[1] 50 Geo. III. c. 112, s. 32.
[2] 48 Geo. III. c. 151, s. 17.
[3] 31 & 32 Vict. c. 100, s. 4.
[4] 2 & 3 Vict. c. 36, s. 10; see also 31 & 32 Vict. c. 100, s. 5.
[5] 31 & 32 Vict. c. 100, s. 4.
[6] *Ibid.*, s. 6.
[7] C.A.S., C, ii. 7.

The senior judge presides and signs the judgments, which have the same force and effect as if pronounced by the First or Second Division, to whose rolls the respective cases belong.[1]

8. Interlocutors pronounced by the Divisions of the Inner House are signed by the Lord President and the Lord Justice-Clerk respectively, the signatures being adhibited in presence of a quorum of each Division (inclusive of the judge signing),[2] the letters I.P.D., signifying *In Præsentia Dominorum*, being added after each signature. In the absence of the Lord President or the Lord Justice-Clerk the judge next in seniority presides and signs the interlocutors in similar manner.[3] Acts of Sederunt are signed by the Lord President, whom failing, by the Lord Justice-Clerk. The Lord President and the Lord Justice-Clerk have each but one vote and no casting vote.

[*Note.*—Interlocutors of the Registration Appeal Court and the Lands Valuation Appeal Court are signed by all three members of the respective Courts.]

Subsection (3).—*Inner House Business.*

9. A number of petitions and applications, to be after mentioned, are specially appropriated to the Inner House; but the main body of business transacted by the Divisions is the hearing and disposal of reclaiming notes against judgments of the Lords Ordinary (including the Lord Ordinary on the Bills) and appeals from Sheriffs, Sheriffs-Substitute, Dean of Guild Courts, the Railway and Canal Commission, the Land Court, the Lyon Court, and other lower Courts, including Courts of Inquiry under the Merchant Shipping Act, 1894. Reports by interlocutor, or, in emergencies, verbal reports are made by Lords Ordinary to the Inner House for directions, which are given by interlocutor by the Division consulted. Motions for new trial and bills of exceptions come also before the Divisions, and if the judge who presided at the trial is not one of the judges of the particular Division, his presence on the bench is necessary, and he has a vote like the other judges.[4]

10. Actions remitted to the Court of Session from Sheriff Courts for jury trial are sent to the Division selected by the party applying for the remit.[5] Actions remitted on cause shewn or *ex proprio motu* by Sheriffs to the Court of Session also are sent to one of the two Divisions.[6] Appeals for jury trial under s. 41 of the Titles to Land Consolidation Act, 1868,[7] being appeals from the judgment of the Sheriff of Chancery or Sheriffs in petitions for service, would come to the Inner House if the appellant thought fit to insist on exercising this statutory right, but the form of appeal is obsolete, and an ordinary appeal is the modern method of seeking review of such judgments.

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[1] C.A.S., A, i. 2.
[2] Act, 29th April 1686, c. 4.
[3] 48 Geo. III. c. 151, s. 2.
[4] 31 & 32 Vict. c. 100, s. 58.
[5] 7 Edw. VII. c. 51, s. 30; C.A.S., D, iv.
[6] *Ibid.*, s. 5 (2); C.A.S., D, iv.
[7] 32 & 33 Vict. c. 116.

SUBSECTION (4).—*Choice of Division.*

11. A pursuer raising an action in the Court of Session, when lodging his summons for calling, besides having a choice of Lord Ordinary, has also choice of an appellate Division in view of his case going thither later on reclaiming note. What is called the *partibus*, written on the principal summons, sets forth the selected Division and Lord Ordinary. Similarly, the party marking a suspension or suspension and interdict from the Bill Chamber to the Outer House on a passed note, marks the Division and Lord Ordinary selected.[1] Appellants from Sheriff Courts must now specify the Division to which they mark an appeal. Appellants from other inferior Courts ought to specify the Division, but if an appeal be marked merely "to the Court of Session," the First Division is the tribunal which receives it. Special cases, stated cases, and petitions must have the Division selected printed or written on them at the time of presentation, this being necessary in Outer House and Junior Lord Ordinary petitions as well as in those presented to the Inner House. Petitions and complaints for breach of interdict go before the Division marked at the time when proceedings were taken from the Bill Chamber to the Outer House; or, if the proceedings have not left the Bill Chamber, the First Division will be the appropriate tribunal. In petitions and complaints against officials, etc., there is a choice of Division competent, but the First Division has in the past been approached in the few cases of the kind dealt with.

SUBSECTION (5).—*Actions appropriated to Inner House.*

12. Apart from petitions and other summary applications there are still certain causes which, though not of an appellate nature, are nevertheless appropriated to the Inner House. An action of Division of Commonty, if raised in the Court of Session, must, after being initiated before a Lord Ordinary, come before a Division by great avizandum made by the judge, to whom later the cause is returned for completion. Actions of Division of Runrig Lands and of Division and Sale of Common Property follow the same procedure. As Division of Commonty and Division and Sale of Common Property are actions now competent in the Sheriff Court,[2] some less elaborate process than now exists in the Court of Session seems to be called for. Cognition of the Insane may be classed as an Inner House action in respect that it proceeds on a brieve issued from Chancery and addressed to the Lord President, who makes arrangements for trial by a special jury, and after trial makes a retour to Chancery.[3] Special cases for opinion and judgment of the Court on questions of law come to the Division agreed on by the parties.[4] Exchequer stated cases, though presented to the Lord Ordinary in

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[1] 1 & 2 Vict. c. 118, s. 4.
[2] 7 Edw. VII. c. 51, s. 5.
[3] 31 & 32 Vict. c. 100, s. 101; C.A.S., D, vi.
[4] 31 & 32 Vict. c. 100, s. 63.

Exchequer causes, are, by interlocutor, sent on by him to the Inner House, now, by arrangement, to the First Division.

Subsection (6).—*Inner House Petitions.*

13. Petitions to the *nobile officium*, being applications for remedies unprovided for by statutes, necessarily go to the Inner House. Such petitions have been of infinite variety, and sometimes they betoken the harbouring of a belief that the *nobile officium* can meet all emergencies. Thus, for example, a husband sought, by petition to the Inner House, an order for delivery to him and custody of his wife, then under her relatives' protection, but wisely abandoned his petition before it came on for hearing. Applications in common use concern recall of arrestments and inhibition used by letters or on dependence of actions where there is no called summons yet before a Lord Ordinary; petitions for altering schemes or for approval of new schemes for administering charitable and educational trusts; petitions for warrant to sheriff-officers to execute diligence in districts where no messengers-at-arms are located (though now, since the coming into force of the Execution of Diligence (Scotland) Act, 1926,[1] such petitions are confined to applications for warrant to arrest to found jurisdiction); petitions to authorise belated insertion of *Gazette* notices or to allow belated registration of abbreviates in sequestrations; petitions for commission to take evidence to lie *in retentis* in actions not yet called; petitions by the Lord Advocate for appointment of interim officials in public departments.

14. Other petitions go to the Inner House by statute, such as petitions under the Companies Act, 1908,[2] the Merchant Shipping Act, 1894,[3] the National Insurance Act, 1911,[4] and the Conveyancing Act, 1874;[5] petitions for authorised excuse under the Corrupt and Illegal Practices Prevention Act, 1883, s. 34;[6] petitions for custody and access under the Guardianship of Infants Acts, 1886 and 1925;[7] petitions in connection with appeals to House of Lords; petitions for authority to examine witnesses in Scotland with reference to actions in English, Irish, and Colonial Courts,[8] and to actions in foreign Courts;[9] petitions under the British Law Ascertainment Act, 1859;[10] and petitions for removal of law agents from the roll.[11] Petitions and complaints against officers of Court craving punishment for malversation are presented to one of the Divisions.[12] Petitions and complaints for breach of interdict are also presented to one of the Divisions; the concurrence of the Lord Advocate is required before presentation; the practice now is for the Division to deal with the proceedings without remit to a Lord Ordinary, as was allowed by s. 89 of Act of Sederunt, 11th July 1828.

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[1] 16 & 17 Geo. V. c. 16.
[2] 8 Edw. VII. c. 69.
[3] 57 & 58 Vict. c. 60.
[4] 1 & 2 Geo. V. c. 55.
[5] 37 & 38 Vict. c. 94.
[6] 46 & 47 Vict. c. 51.
[7] 49 & 50 Vict. c. 27 and 15 & 16 Geo. V. c. 45.
[8] 22 Vict. c. 20; *Campbell* v. *Earl of Breadalbane*, 1867, 5 M. 850.
[9] 19 & 20 Vict. c. 113.
[10] 22 & 23 Vict. c. 63, s. 1.
[11] 36 & 37 Vict. c. 63.
[12] 1 & 2 Vict. c. 118, s. 30.

SUBSECTION (7).—*Consultation of Judges.*

15. When the judges of a Division, after hearing a case, come to be equally divided in opinion, or, when, owing to novelty or difficulty of a point of law raised, or when in the opinion of the bench a fuller bench should consider the case, the Division may order a rehearing to proceed before a bench of five or seven judges (usually now the latter), and the order for rehearing invariably confines the argument to one counsel on each side.[1] When it is deemed necessary in cases of importance to have the opinion of the whole Court, questions of law are prepared and boxed to the Court, when written opinions will be given by the individual judges with or without a rehearing.[2] The actual operative judgments pronounced in all cases are given by the Division before whom the actions depend, and they are given in conformity with the opinions of the majority of the whole judges engaged.

SUBSECTION (8).—*Lord President.*

16. The head of the whole Court is the Lord President, who occupies the chair in the First Division. At the foundation of the College of Justice the office of President was created, and yet, while the President was declared to be head of the Court established, the Act of 1532 provided "that my Lord Chancelar, being present in this toun or other place, he sall have voit and be principale of the said Counsell." The first four Presidents were prelates appointed by the King, but by the Act 1579, c. 93, it was declared that the President should be chosen by the whole judges, "whether he was of the temporal or spiritual estate." Later, in 1593, James VI. declared at a sitting of the Court that when any vacancy should occur he would himself name three persons from whose number the judges should elect the best qualified. However, it was not long before the King resumed the practice of appointing all judges, including Presidents, and since 1641 the matter has been so regulated by statute.

17. Since 1830 the two formerly separate offices of Lord Justice-General and Lord President have been merged in the one individual, s. 18 of the Court of Session Act, 1830,[3] enacting that "The office of Lord Justice-General shall devolve upon and remain united with the office of Lord President of the Court of Session, who shall perform the duties thereof as presiding judge in the Court of Justiciary." All Acts of Sederunt are signed by the Lord President (whom failing, by the Lord Justice-Clerk), and transfers under the Distribution of Business Act, 1857, of cases from one Division to the other or from one Lord Ordinary to another are made by the Lord President alone.[4] The Lord President is exempted from service in vacation as Lord Ordinary officiating on the

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[1] 31 & 32 Vict. c. 100, ss. 59 and 60.
[2] 48 Geo. III. c. 151, s. 10; 6 Geo. IV. c. 120, ss. 23 and 24.
[3] 1 Will. IV. c. 69, s. 18.
[4] 20 & 21 Vict. c. 56, ss. 1 and 2.

Bills, but on occasions a Lord President has officiated and also has acted in Outer House proceedings to relieve congestion.

Subsection (9).—*Lord Justice-Clerk.*

18. The Lord Justice-Clerk is President of the Second Division, and ranks next to the Lord President as regards judicial status. Though the greater part of the functions exercised by the modern holder of the office effeirs to civil administration, the title was derived from the criminal branch of law, the Justice-Clerk in olden times having been the Clerk and Assessor of the Criminal Court until 1663, when he was added to the bench as one of the judges. In 1672, when the Justiciary Court was instituted, the Justice-General was appointed President of the Court, and the Justice-Clerk his deputy. While the title of Justice-General is of greater antiquity than that of Justice-Clerk, going back prior to 1216, the title of the latter is also venerable, for there is record, during the reign of David II., in 1329, of one William de Camera being Justice-Clerk.

19. As President of the Second Division the Lord Justice-Clerk discharges the same judicial duties as does the Lord President in the First Division, and, when necessary, he deputises for the latter as head of the Court. The Lord Justice-Clerk is exempt from vacation duties on the Bills.

Subsection (10).—*Outer House: Lords Ordinary.*

20. The Outer House has five judges known as Lords Ordinary who are the judges of first instance in the Court of Session. A litigant raising an action has the right to choose any one of the five as the judge before whom he will have his summons called after service. This choice does not require to be made when signeting and serving a summons, but only when lodging the same for calling. The choice of judge is, however, liable to be overruled at a later stage by transference of a cause to another judge under the powers conferred on the Lord President by the Distribution of Business Act, 1857.[1] The Lord Ordinary chosen may find it necessary, and he has the right, to remit a cause to another judge in respect of contingency with an action pending before the latter. In the event of absence through indisposition or for other necessary reason of any judge, it is competent for the Lord President to nominate another judge to officiate in his place.[2] Interlocutors and judgments pronounced by the substitute judge should bear that they are pronounced by "Lord B. for Lord A.," the cause still being before the original Lord Ordinary, in whose office the process remains.

21. In addition to actions initiated by summons, a Lord Ordinary deals with petitions under the Trusts Act, 1921,[3] the Presumption of Life Limitation (Scotland) Act, 1891,[4] the Patents and Designs Act, 1907,[5]

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[1] 20 & 21 Vict. c. 56, s. 1. [2] 31 & 32 Vict. c. 100, s. 12. [3] 11 & 12 Geo. V. c. 58.
[4] 54 & 55 Vict. c. 29. [5] 7 Edw. VII. c. 29; C.A.S., C, vi. 2 and 3.

and the Conjugal Rights (Scotland) Amendment Act, 1861.[1] Petitions craving possession of property or to compel performance of statutory duties also come before a Lord Ordinary in session. In vacation or recess such petitions go to the Lord Ordinary on the Bills, but may be marked to a Lord Ordinary in the Outer House when session begins.[2]

22. The Junior Lord Ordinary, besides having to transact the same business in litigations as do the other Outer House judges, has to exercise the functions of Lord Ordinary on the Bills, and also, in his distinct capacity as Junior Lord Ordinary, has to deal with the summary petitions specified in the Distribution of Business Act, 1857.[3] These Junior Lord Ordinary petitions are sometimes loosely described as "Bill Chamber" proceedings. They are not Bill Chamber proceedings, but since 1889 they have been housed and dealt with in the Bill Chamber office. Prior to 1889 they were kept and dealt with in the Outer House office of the Junior Lord Ordinary, but the Clerks of Session (Scotland) Regulation Act, 1889, charged the Bill Chamber staff with their custody and relative proceedings.[4]

23. As Lord Ordinary on the Bills the Junior Lord Ordinary deals with suspensions and interdicts in their early and urgent stages, with sequestrations and bankruptcy proceedings, including appeals, which latter he can himself (or through the medium of any vacation judge) dispose of in vacation, though judgments in these may be reclaimed against. He can also, in the Bill Chamber, grant final decree in unopposed suspensions and interdicts without their being sent to the Outer House.[5]

24. The second Junior Lord Ordinary is Lord Ordinary on Teinds.[6] One of the five Lords Ordinary (usually the third junior) is specially appointed Lord Ordinary in Exchequer Causes, but in his absence any other judge may act for him.[7] One Lord Ordinary sits along with two Inner House judges—one from each Division—as the Registration Appeal Court, the three judges being appointed from time to time by Act of Sederunt,[8] and in practice the same rule is followed in appointing judges to sit as the Lands Valuation Appeal Court—one judge from each Division and one from the Outer House. The Senior Lord Ordinary may be required to rehear a case which has already been dealt with by a Court of Inquiry or Local Marine Board if the Board of Trade so order under the Merchant Shipping Act, 1894.[9] The Lord President has, however, power to detail another judge to act.

SUBSECTION (11).—*Lord Ordinary officiating on the Bills in Vacation.*

25. In vacation, recess, or adjournment the judges (other than the Lord President and the Lord Justice-Clerk) act in rotation as vacation judges, two weeks being, as near as may be, the spell of duty for each. As

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[1] 24 & 25 Vict. c. 86.
[2] 31 & 32 Vict. c. 100, ss. 59 and 60.
[3] 20 & 21 Vict. c. 56, s. 4.
[4] 52 & 53 Vict. c. 54, s. 3.
[5] C.A.S., E, ii. 25.
[6] 1 & 2 Vict. c. 118, s. 2.
[7] 19 & 20 Vict. c. 56, s. 2.
[8] 31 & 32 Vict. c. 48, s. 23.
[9] 57 & 58 Vict. c. 60, s. 475 (2).

regards Bill Chamber and Junior Lord Ordinary proceedings, vacation, recess, or adjournment of the Court makes no difference, and the vacation judge may proceed as fully and competently as the judge who is actually Junior Lord Ordinary. Outer House business is not in so fortunate a position, for most affairs of real importance in actions can only be dealt with at vacation Courts held after the box-days. Spring and autumn vacations have each but two of such Courts. By s. 93 of the Court of Session Act, 1868,[1] it is provided that the Lord Ordinary officiating on the Bills at such Courts may grant or recall decrees in absence, hear and dispose of motions in reference to preparation of records or granting commission and diligence for recovery of documents or taking of evidence. The Act of Sederunt, 20th March 1907, s. 10,[2] extended the powers of the vacation judge so as to make it allowable for him to deal with every motion which could competently be moved in Outer House causes during session, but gave him a discretion of holding up motions for disposal by the judge to whom the cause belonged. The most valuable function now exercised by the vacation judge at vacation Courts is the granting of decrees for expenses in Outer House processes. In Inner House causes he cannot grant decrees for expenses except in petitions, decrees in which come under the definition "incidental motions" which do not involve the merits.[3] The party liable in expenses in Inner House actions has, therefore, sometimes a lengthy period available during which he can set about alienating his property to defeat the claim. Although the Act of Sederunt makes it competent for the vacation judge to entertain and dispose of all incidental motions in petitions in the Inner House while that judge is officiating at a vacation Court, the practice is for such motions as are competent to be dealt with entirely in chambers. Unrestricted by any provision in the Act of Sederunt, all proceedings under the Companies Act go through in vacation, if necessary, from start to finish.[4] Certain petitions to the *nobile officium* are commonly dealt with *de plano* by the vacation judge, such as the making of interim appointments of Court officials, correcting mistakes or omissions in sequestration proceedings, granting warrant to sheriff-officers to arrest to found jurisdiction when no messenger-at-arms is available, and granting commission to take evidence to lie *in retentis* when a summons is served but not called. Recent judicial pronouncements suggest that a vacation judge's exercise of power in regard to petitions and complaints should be confined to ordering service.

Subsection (12).—*Assessors.*

26. In the Court of Session there is provision made for two classes of assessors being engaged, if required, to sit with a Lord Ordinary or

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[1] 31 & 32 Vict. c. 100.

[2] C.A.S., A, i. 3 (*a*).

[3] C.A.S., A, i. 3 (*b*).

[4] *London County and Westminster Bank, Petrs.*, 1911 S.C. 1073; 8 Edw. VII. c. 69, s. 135.

Division to advise on technical matters, these being, respectively, nautical assessors for maritime causes and skilled persons for cases concerning patents.

(i) *Nautical Assessors.*

27. The attendance of nautical assessors in certain appeals is called for by the Merchant Shipping Act, 1894,[1] while in maritime causes generally provision is made for the summoning of a nautical assessor or assessors to attend in the Court of Session, Outer House, and Inner House by the Nautical Assessors (Scotland) Act, 1894.[2] This Act applies also to Sheriff Courts and to the House of Lords when hearing Scottish appeals. The Lord President approves of a list of qualified assessors who request to have their names inserted therein, certain of them being Elder Brethren of Trinity House, London, others being shipmasters in Scotland who have quitted sea-going service. Sec. 2 of the Nautical Assessors Act enacts that in maritime causes the Court may, if it thinks fit, and shall, on the application of any party, summon to its assistance at a trial or subsequent hearing on reclaiming note, appeal, or otherwise, one or more nautical assessors; and the procedure for summoning, objecting to, remunerating, and judicially consulting assessors is laid down by Act of Sederunt of 8th December 1894.[3] Local inquiries ordered by the Board of Trade into shipping casualties require the presence of two nautical assessors when the suspension or cancellation of the certificate of a master, mate, or engineer is involved,[4] and in appeals to the Inner House from the judgments of such Courts of Inquiry when suspension or cancellation is involved, two assessors are also required. The Principal Clerk of Session calls for and fixes the amount to be consigned by the party or parties to meet the fees and expenses of assessors in the Court of Session, and pays the fees and expenses out of the consigned sum.

(ii) *Assessors in Patent Cases.*

28. The Patents and Designs Act, 1907,[5] provides that in an action or proceeding for infringement or revocation (reduction) of a patent, the Court may, if it thinks fit, or shall, on the request of either party, call in the aid of an assessor specially qualified, and try the case with his assistance, and an assessor may also be appointed by the Court in appeals (or reclaiming notes). The assessor's remuneration is determined by the Court.[6] Patent cases in the Court of Session invariably see each side adducing an imposing array of highly qualified witnesses, and, in practice, the addition to proceedings of still another highly qualified person, as assessor, is not encouraged.

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[1] 57 & 58 Vict. c. 60.
[2] 57 & 58 Vict. c. 40.
[3] C.A.S., A, vii.
[4] 57 & 58 Vict. c. 60, s. 466.
[5] 7 Edw. VII. c. 29, ss. 31 (1) and 94 (1) and (3).
[6] *Ibid.*, s. 31 (3).

SUBSECTION (13).—*Acts of Sederunt.*

29. Apart from the powers conferred by statute on the Court of Session to make regulations for the conduct of its business, the Court as a supreme tribunal has an inherent right to make ordinances considered necessary with respect to procedure. Such ordinances are called Acts of Sederunt. The Acts of Sederunt passed by the Court following on the institution of the College of Justice were, by the Act 1540, c. 93, ratified and approved by the King when he attained "his perfite age of twentie five zieres," and by the statute the judges were expressly authorised "to make sic acts, statutes, and ordinances as they sall think expedient for ordouring of process and haistie expedition of justice." The Court soon exceeded the powers thus conferred and made new laws in the guise of Acts of Sederunt, which Parliament had to ratify. Certain of these Acts of Sederunt were declaratory of the laws as they stood, others made changes in the law, and, following a practice borrowed from France, these were laid before the Legislature, and, if approved, they had the force of statutes. Examples of those altering the law are the Act of Sederunt of 28th February 1662 relating to executors-creditors; that of 24th June 1665 relating to pro-tutors; and that of 14th December 1756 introducing a new form of removing tenants, different from that provided by the Statute 1555, c. 39. Although after 1756 the Court would seem to have refrained from going beyond its mandate, in July 1808 there came a command from the House of Lords ordering "that the Lords of Session do prepare and transmit to this House copies of all Acts of Sederunt now in force, distinguishing those which, strictly speaking, are rules of Court and prescribe forms of proceeding, from those that explain, or in any way affect the law of the land." The Court was on its defence and submitted an elaborate report in reply, in which, *inter alia*, the fact was pointed out that since 1756 the regulations passed were within the powers conferred by the Court's original constitution, or were authorised by statute.[1]

30. While the Court has been careful not to stray beyond its jurisdiction since the date mentioned, besides regulating its own internal concerns, even down to the fabric of paper to be used, it has been by many statutes not only authorised but required to pass Acts of Sederunt anent sundry matters, some of which might seem to have remote connection with a College of Justice, as, for example, regulating applications under the Dogs Act, 1906. By s. 106 of the Court of Session Act, 1868, the Court may pass Acts of Sederunt in session or vacation; and by s. 11 of the Court of Session Act, 1808,[2] a quorum of nine judges is required to pass Acts. In 1913 a Codifying Act of Sederunt was passed, and while the majority of important and useful Acts in force were included, a number of Acts and sections of Acts do not appear, but such Acts and

[1] Alexander's Abr. i. p. xiv.
[2] 48 Geo. III. c. 151.

sections are not held as repealed unless they are inconsistent with the Codifying Act.[1]

Subsection (14).—*Rolls of Court.*

(A) *Inner House.*

(i) *Single Bills.*

31. This is the term used to denote the Motion Rolls of the Inner House Divisions. Originally those bills (or petitions) which were unopposed were called "single," but nowadays motions of all sorts, opposed or unopposed, often involving quite lengthy discussions, are dealt with in Single Bills. Petitions and answers, appeals, reclaiming notes, stated cases, special cases, remitted causes, issues, Exchequer cases, reports, and bills of exceptions, being printed and boxed, appear automatically in Single Bills, the boxing operating as the enrolment. Manuscript notes, or specifications of documents, or motions in jury causes, or Auditors' reports, or other incidental motions, have to be enrolled, but not by means of enrolling slips in the manner required in the Outer House. A copy of the document in respect of which a motion is to be made is handed to the Keeper of the Rolls of the Division, or, if there be no actual document, a "dummy" half-sheet of process paper, folded shortwise and backed "Motion," etc., with the name of the case and stating the purpose of the motion, is given to the Keeper, who daily makes out his list of Single Bills for the morrow from the papers thus handed to him, and the papers boxed as above mentioned.

(ii) *Short Roll.*

32. This roll represents the main body of work in the Inner House, the cases sent to it being chiefly those brought from the Outer House by reclaiming note and from inferior Courts by appeal when final judgment has been given. The cases are necessarily of heavier calibre than those sent to the Summar Roll, and longer time is required by parties for preparation by way of printing notes of evidence and appendices. Consequently a period of about six months usually elapses before a case sent to the Short Roll comes out for hearing, but on cause shewn an early hearing may be granted.

(iii) *Summar Roll.*

33. There are certain classes of cases which are considered deserving of speedy disposal, and when these make their initial appearance in Single Bills counsel moves that they be sent to the Summar Roll. All reclaiming notes from the Bill Chamber, bankruptcy appeals, petitions

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[1] See Ersk. i. t. 1, s. 40; Beveridge. ii. Appendix; Darling's Prac. i. 29; Alexander's Abr. i. Preface; C.A.S., 4th June 1913.

with answers thereto, reports under remits made, reports by Lords Ordinary, reclaiming notes and appeals against interlocutory judgments, Exchequer cases, stated cases on appeal under the Workmen's Compensation Acts, special cases stated by the Land Court, appeals under the Burgh Police Acts, appeals under the Small Landholders Act, 1911, issues and records for discussion on relevancy, motions for new trials and hearings on rules granted, bills of exceptions, hearings on proofs taken by Inner House judges, and all incidental matters considered too weighty for discussing in Single Bills go to the Summar Roll. Dean of Guild appeals are sent to that roll by the Second Division, but the First Division sends such to the Short Roll and allows an early hearing.

(iv) *Long Roll.*

34. This is the roll to which are sent causes in which procedure has been stayed by sist, or which are awaiting the result of remits to reporters, or which have been delayed for settlement. No interlocutor is pronounced sending cases to the Long Roll.

(v) *Jury Cause Roll.*

35. By Act of Sederunt, 29th June 1905,[1] this roll was created in order that, if necessary, transfers from one Division to the other might be made under the Distribution of Business Act, 1857.[2] Each Keeper of the Inner House Rolls is required to make up a separate roll wherein he shall enter causes remitted from Sheriff Courts in which issues have been adjusted in the Inner House but not remitted to a Lord Ordinary, also all causes sent by Outer House judges to the Inner House jury sittings.

(B) *Outer House.*

(i) *Calling Lists.*

36. Intimation of an action raised in the Court of Session is first publicly made by the calling of the summons, the title (or *partibus*) of which, giving the names and designations of pursuers and defenders and names of pursuer's counsel and agents, appears on the walls of Court and in the published rolls. A summons, duly served, on the expiry of the *inducicæ*, is lodged at the clerk's office for calling, being handed in, along with a made-up process, on the day preceding that on which it is to be called. If it is desired to be called on one of the box-days in vacation, the lodgment must be made two days prior to the box-day.[3] During session the calling lists are published daily except on Mondays, and each vacation box-day has its appropriate calling lists. Except in Exchequer causes a pursuer has the right to call his summons before any one of the five Lords Ordinary.

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[1] C.A.S., F, i. 11. [2] 20 & 21 Vict. c. 56. [3] C.A.S., C, i. 10.

(ii) *Undefended Roll.*

37. During session a roll of undefended causes is made up and published daily (except Monday), the warrant for enrolling therein being granted by the Assistant Clerk of Session on a slip which is taken to the enrolling room, where the judge's personal clerk attends to prepare his daily rolls. The cause appears in the following day's roll, the pursuer's designation and address and name of his counsel being omitted, though the defender must be described in full. The same procedure applies to vacation box-days, save that the decree in absence is not given until the fifth lawful day after box-day, when a vacation Court is held. Decree in absence may be given (1) if no appearance is entered within two days after a summons is called, or (2) if defences are not lodged within ten days after calling, or, in vacation, on the next ensuing box-day. No appearance by counsel is required to obtain decree in the undefended roll, and the decree includes the expenses as taxed, but no report by the Auditor is taken. Decrees in the undefended roll are not competent in actions of proving the tenor [1] nor in consistorial actions, for evidence in both these classes of cause must be led before the Lord Ordinary.[2]

(iii) *Motion Roll.*

38. All motions of an incidental nature, such as for approval of Auditor's reports, for revisal, adjustment or amendment of pleadings, for leave to reclaim, for transference, for wakening, or for decree by default are made before the Lord Ordinary, and each Lord Ordinary must call his Motion Roll before any other business is taken up. An enrolling slip is left in the receptacle in the box-room applicable to the particular judge forty-eight hours before the motion is to be made, or, on cause shewn, it will be taken by the judge's clerk twenty-four hours before the motion. The judge's clerk daily makes up for the printer the Motion Roll for publication, and in vacation the roll is made up two days prior to each vacation Court. The vacation judge deals with motions applicable to the whole Outer House.[3]

(iv) *Procedure Roll.*

39. This roll in practice now incorporates what was formerly the "Debate Roll," the Procedure Roll having been instituted by Act of Sederunt, 10th March 1870,[4] which enacted that "if the parties are at variance as to whether there shall be proof or as to what proof ought to be allowed, or if they or any of them shall maintain that one or more of the pleas on the record should be disposed of before determining on the matter of proof, the Lord Ordinary shall appoint the cause to be enrolled in a roll to be called the Procedure Roll." The Act of Sederunt, 15th

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[1] C.A.S., C, iv. 5 (*b*).

[2] 11 Geo. IV. and 1 Will. IV. c. 69, s. 36. See Court of Session Act, 1868, 31 & 32 Vict. c. 100, s. 23; also C.A.S., C, ii. 3.

[3] C.A.S., C, ii. 1 and 2.

[4] C.A.S., C, ii. 4 (*c*).

November 1872, s. 4,[1] enacted that if no counsel appears at the calling of a case and no admissible excuse be offered for non-attendance, the Lord Ordinary shall dismiss the action with no expenses to either side, and even of consent this dismissal can only be recalled on reclaiming note to the Inner House. Should counsel appear on one side and no counsel appear on the other without excuse given, decree by default may be asked by the counsel attending, or the Lord Ordinary, unasked, may dismiss the action with no expenses to either side. In abolishing the "blank days" of the Lords Ordinary, s. 6 of the Court of Session Act, 1868, enacted that on one sederunt day in each week each Lord Ordinary in rotation should not call Debate or Motion Rolls, but should sit for proofs or jury trials. In practice this was not followed closely, and by Act of Sederunt, 20th June 1870,[2] the Lords Ordinary are allowed full discretion as to calling Procedure Roll on such reserved days.

Subsection (15).—*Box-Days.*

40. In each of the spring and autumn vacations there are two box-days and in Christmas recess there is one box-day, these being fixed by Minutes of Court some time prior to the commencement of each vacation or recess.[3] Summonses are called and defences due are lodged on such box-days, and on the fifth lawful day after each box-day the Lord Ordinary officiating on the Bills in vacation holds a vacation Court for the granting of decrees in absence and for disposing of incidental motions applicable to the whole Outer House.[4] On each box-day there is a clerk in attendance who receives papers tendered for boxing and distributes them among the boxes pertaining to the several judges and officials, the libraries, and the reporters of decisions. Summonses for calling on box-days must be lodged at the Register House two days in advance.[5] In each week wherein a box-day occurs the assistant clerks attend their offices every day except Wednesday. As two days are allowed for entering appearance and as box-days are usually fixed on Thursdays, the Saturday opening of the offices allows appearance to be entered to defend summonses on that day. Enrolments for vacation Courts following box-days are taken up in the box-room two days in advance.

Section 3.—Officials of Court.

Subsection (1).—*Principal Clerk of Session.*

41. There is now but one Principal Clerk of Session, who is not attached to any Division or Court, although he actually sits and officiates in the First Division. The reduction to one clerk was operated by the Clerks of Session (Scotland) Regulation Act, 1913.[6] Before that statute the number of Principal Clerks for many years had been two, and at one time as many as six had held office. The original Principal Clerk would

[1] C.A.S., C, ii. 9.
[2] C.A.S., C, ii. 7.
[3] 31 & 32 Vict. c. 100, s. 4.
[4] *Ibid.*, s. 93.
[5] C.A.S., C, i. 10 (*b*).
[6] 2 & 3 Geo. V. c. 23, s. 1.

appear to have also held office as Clerk Register and as a Lord of Session. In the minute of the first meeting of the College of Justice as recorded in the Books of Sederunt there is the following item: "The quhilk day the King's Grace hes admittit Maister James Foulis to the office of the clerk of registrie, rollis, and of counsale, and hes presently chosin him anc of the Lordis of his Sessioun and to have voit thairin." Sec. 10 of the Articles of Regulation concerning the Session, 1695, declared that the Lords of Session should observe the rule that no person be admitted to be a clerk in the Inner House unless he be an advocate or writer to the signet, and had served as such three years at least. This section did no more than lay a duty on the Lords of checking the qualifications of those presented, for by Act of Sederunt, 8th June 1680, the right of nomination of Principal Clerks had been given to the Lord Clerk Register, who, between 1676 and 1680, had the right previously held taken from him and transferred to the Court. By Act of Sederunt, 2nd June 1697, the Lords appointed a form of trial to be undergone by a Principal Clerk before admission, but that form has been modified in practice to the present test of writing an interlocutor in a cause before the Court.

42. Although since 1695 only advocates and writers to the signet have been appointed to the office, the Clerks of Session (Scotland) Regulation Act, 1889, made a certificated and enrolled law agent eligible for appointment.[1] The holder of the office is precluded from engaging in practice. The salary at present is £1100, with possible fees in addition as Prescribed Officer in election petitions, which are now rare, and also for special duties which may be imposed by Act of Parliament if sanctioned by the Lord Advocate with approval of the Treasury.[2] The Principal Clerk of Session attends with a number of his Deputes, under the Act of Union, at the election of Scottish Representative Peers held in Holyrood, his status being as Deputy of the Lord Clerk Register. While the Principal Clerk does discharge certain Court duties, such as officiating at jury trials and approving of caution by liquidators and judicial caution, his official duties are now more of an administrative, advisory, and consultative sort. He exercises control over the Depute Clerks, the Clerk of the Bills, the Assistant and Ordinary Clerks, the Extractor, who now is also the Keeper of the Minute Book, and the Court of Session Macers. He has power, with approval of the Lord President, to arrange for the allocation of duties among the clerks, and, if necessary, to suspend for a period not exceeding six months any officer guilty of misconduct or wilful neglect of duty.

Subsection (2).—*Depute Clerks.*

(i) *Inner House.*

43. There are two Inner House Depute Clerks, the officials formerly known as "Assistant Clerks in the Inner House" having had the status

[1] 52 & 53 Vict. c. 54, s. 12. [2] *Ibid.*, s. 5.

of "Inner House Depute Clerks" conferred on them by the Clerks of Session (Scotland) Regulation Act, 1889.[1] While the Act provides that those officers should, when desired by the Principal Clerk, and under his supervision and the supervision of the Court, take part in writing interlocutors and afford other assistance by attending in Court daily, the later Clerks of Session Act, 1913,[2] has effected a rearrangement of the duties of Inner House Clerks. Thus, the Principal Clerk of Session has been detached from particular Court duties in either Division, and the Inner House Depute Clerks and Ordinary Clerks have been charged with responsibility for the Court work in the same manner as the Depute and Assistant Clerks in the Outer House. The Inner House Deputes are responsible for the framing and writing of all interlocutors, and they have the assistance each morning for Single Bills of the Ordinary Clerks. They adjust interrogatories for examining witnesses on commission, and act as Jury Clerks at the trials proceeding at the vacation sittings and during session. In the absence of the Principal Clerk they consider and approve of bonds of caution by liquidators and bonds of judicial caution. During part of each vacation they attend at the offices in the Register House while the Ordinary Clerks are on holiday. A sederunt book is kept and written up daily by each Inner House Depute, and the First Division Depute has charge of the Books of Sederunt of Court wherein are recorded all Acts of Sederunt and Minutes of Court, lists of transferred causes, particulars of proceedings at installations of judges, acts admitting advocates and commissions of Court officials. As in the Outer House, the names of the Inner House Depute Clerks appear on all papers and prints in proceedings in their respective Divisions. Each Depute Clerk has a salary of £500, rising to £600, per annum, and these clerks may not engage in practice. They are appointed by the Crown, with commissions under the royal sign-manual.

(ii). *Outer House.*

44. There are five Depute Clerks in the Outer House, one being attached to each Lord Ordinary. The nomination of the Depute Clerks was formerly vested in the Principal Clerks,[3] but by the Court of Session Act, 1830,[4] the appointment was vested in the Crown. The duties are to attend in Court at debates, proofs, adjustment of issues, and jury trials, and the Deputes and their assistants share the Motion Roll work equally between them. The Deputes write the interlocutors of Court and adjust interrogatories for examination of witnesses on commission. All the Depute Clerks (including, since 1889, the Inner House Deputes) are empowered to discharge the duties of the Principal Clerk when he is absent.[5] Each Depute Clerk has, with his assistant, an office at New Register House, where the processes pertaining to the several Lords Ordinary are kept. The Depute Clerks are responsible for their offices

[1] 52 & 53 Vict. c. 54. [2] 2 & 3 Geo. V. c. 23. [3] 50 Geo. III. c. 112, s. 26.
[4] 11 Geo. IV. and 1 Will. IV. c. 69, s. 14. [5] 1 & 2 Vict. c. 118, s. 7.

being efficiently kept, though the Assistant Clerks, by Act of Sederunt, 14th October 1868, s. 17,[1] have the duty laid on them of attending at Register House and keeping the offices open daily during specified hours in session and vacation. The Depute Clerks relieve their assistants during part of each vacation. The duty of acting as Circuit Clerks at Justiciary Circuits imposed by s. 73 of the Criminal Procedure Act, 1887,[2] was removed by an amending statute of 1898,[3] which enacted that the circuit duties should be performed by the then sole Circuit Clerk and by the first and second Assistant Clerks of Justiciary. The salary of a Depute Clerk is £500, rising to £600, per annum.

Subsection (3).—*Assistant Clerks.*

(i) *Inner House.*

45. There are two Assistant Clerks, one for each Division, and officially they are designated "Ordinary Clerks." Prior to 1889 they were known as "sub-assistants," with office duties only, without commissions entitling them to sign or certify any document, the then Inner House Assistant Clerks (now Depute Clerks) having the real charge of the offices, of which each Division had two. By the Clerks of Session (Scotland) Regulation Act, 1889,[4] the number of Assistants was fixed at two, one for each Division, who thenceforth became "Depute Clerks," and the interim office of "sub-assistant" was made permanent, the sub-assistants becoming Ordinary Clerks. These clerks now have commissions from the Crown, and their duties are similar to those discharged by the Assistant Clerks in the Outer House, including attendance in Court each morning. Until 1913 the salary of an Ordinary Clerk was fixed at £250 per annum; but on the duties being rearranged in that year, the scale was put at £250, rising to £400. The daily Minute Book in manuscript applicable to each Division is written up by the Ordinary Clerk, who also certifies proceedings for House of Lords appeals and signs letters of diligence for citing witnesses in Inner House jury trials. A fee stamp book and a register of actions are kept by each Ordinary Clerk.

(ii) *Outer House.*

46. There are five Assistant Clerks in the Outer House, one being attached to each Lord Ordinary's Court. They give assistance to the Deputes, attend in Court each forenoon, and in the absence of the Deputes act in their place. Their chief duties are in the offices in Register House, where they attend during the prescribed hours to receive processes, writs, and productions, lend out borrowable writs and productions, and, when required, mark captions for return of borrowed papers. A fee stamp book is kept by each assistant, and also the daily Minute Book in manuscript is kept written up as regards the acts and decrees pronounced

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[1] C.A.S., A. ii. 2.
[2] 50 & 51 Vict. c. 35.
[3] 61 & 62 Vict. c. 40.
[4] 52 & 53 Vict. c. 54, s. 2.

by his particular judge. Agents and clerks attend at the office counter to transact business by lodging and borrowing writs required and to take copies of interlocutors and verdicts, and it is the Assistant Clerk's duty to minister to their needs, taking care that nothing unborrowable is removed from the office. New summonses are marked, the *partibus* and its copy are checked, and a book representing the calling lists is kept for the entering of appearance to defend. Warrants are granted by the assistants for enrolling in the undefended roll. The salary of an Assistant Clerk prior to 1913 was a fixed £475, but the rearrangement of duties operated in that year led to the emoluments being put on the same scale as that of the Inner House Ordinary Clerks, viz. £250, rising to £400.

47. The Principal Clerk, Depute Clerks, Ordinary Clerks, and Assistant Clerks of Session all qualify for pensions, and may not engage in practice.

Subsection (4).—*Office Hours.*

48. These are, in both Inner House and Outer House during session, every sederunt day except Saturday from 2 to 5 p.m., and Monday 11 a.m. to 3 p.m. In vacation or recess, the hours are from 11 a.m. to 1 p.m. on Monday, Tuesday, Thursday, and Friday, and also on any Wednesday or Saturday which shall be within three days after any box-day, and further, in vacation, on the week-day following the day on which the Court rises.[1]

Subsection (5).—*Clerk of the Bills.*

49. Originally there was one Principal Clerk of the Bills who received his commission from the Lord Clerk Register, but in 1564 by a King's letter a conjunct clerk was appointed on the ground that, although the office was one of great importance to the lieges, it had been held by but one clerk "though it had been much more fitt (upon severall considerationes) that two persones had been employed conjunct in the said office as the custom is in the other clerkships of the Sessioun." By s. 14 of the Court of Session Act (No. 2), 1838,[2] it was enacted that there should be two Clerks of the Bills who should have the whole charge of the Bill Chamber department; and by Act of Sederunt, 24th December 1838, it was declared that each of the two clerks should only be responsible for the caution accepted by himself to the same extent and on the same grounds only in which the clerks were (formerly) liable for caution. The Bill Chamber Procedure Act, 1857,[3] enacted that "there shall in future be only one Clerk of the Bills, who shall be responsible for the reputed solvency of cautioners and for consigned money, and shall discharge in person all the duties attached to the office." Since then there has been only one Clerk of the Bills; and in addition to the duties discharged by

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[1] C.A.S., A, ii. 2, amended by Act of Sederunt, 20th June 1913.
[2] 1 & 2 Vict. c. 118.
[3] 20 & 21 Vict. c. 18, s. 1.

him in purely Bill Chamber proceedings, he has, since 1889, been charged with the duty of acting as Clerk of Court in petitions to the Junior Lord Ordinary (factories, curatories, etc.), which were placed under his jurisdiction by the Clerks of Session (Scotland) Regulation Act of that year.[1] These are the petitions enumerated in s. 4 of the Distribution of Business Act, 1857.[2]

50. In purely Bill Chamber matters (*e.g.* suspensions, interdicts, bankruptcy proceedings), which do not go beyond the Bill Chamber, the Clerk of the Bills issues extracts of judgments, but in proceedings which pertain to the Junior Lord Ordinary, dealt with in the Bill Chamber, the extracts are prepared by the Court of Session Extractor. Bill Chamber bonds of caution are prepared by the Clerk of the Bills, while bonds of caution in Junior Lord Ordinary proceedings are prepared by the agents and approved by the Accountant of Court. Even in Bill Chamber matters, which are in the Inner House on reclaiming note, the Clerk of the Bills is still the Extractor, and proceedings require to be remitted back to the Bill Chamber in view of an operative decree being given, and there extracted. Although the Inner House Division is sitting as an appellate Bill Chamber bench, the Inner House clerks are not entitled to issue Bill Chamber extracts.

51. There are administrative duties discharged by the Clerk of the Bills, such as granting *fiats* on bills for letters of horning, letters of arrestment, and letters of inhibition,[3] and fiats on minutes for assignees under the Personal Diligence Act, 1838.[4] He also grants warrants to dismantle arrested ships.[5] The appointment is by the Crown, the salary is £700 per annum, and practice is barred. (See BILL CHAMBER.)

SUBSECTION (6).—*Assistant Clerk and Ordinary Clerk of the Bills.*

52. By s. 2 of the Bill Chamber Procedure Act, 1857,[6] it was enacted that there might be appointed by the Crown one Assistant Clerk of the Bills and two Ordinary Clerks, the Assistant Clerk acting under the orders of the Clerk of the Bills in performing the duties of the office, and, in the necessary absence of the principal, subscribing all necessary writs and documents. The section did not authorise approval or acceptance of caution by the Assistant Clerk. At present, and for many years past, there has been only one Ordinary Clerk, who assists in the office work, and there is also a clerical assistant appointed by the Clerk of the Bills, but he does not count as one of the permanent staff. The salary of the Assistant Clerk is £300, rising to £475, and that of the Ordinary Clerk is £200, rising to £300, per annum.

53. The Bill Chamber hours differ from those of the Inner and Outer House offices, having been fixed by Act of Sederunt, 10th February 1858, and the hours are, during session, from 10 a.m. to 12 noon and from 2 p.m.

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[1] 52 & 53 Vict. c. 54, s. 3. [2] 20 & 21 Vict. c. 56. [3] C.A.S., E, iii. 1 and 2.
[4] 1 & 2 Vict. c. 114, s. 7. [5] C.A.S., E, iii. 3. [6] 20 & 21 Vict. c. 18.

till 4 p.m., except on Saturday, when there is no attendance in the afternoon. During vacation (and, in practice, during recess or adjournment) the hours are from 10 a.m. to 12 noon and from 2 p.m. till 3 p.m., except on Saturday, when there is no afternoon attendance.[1] During vacation, when the Lord Ordinary is in the Bill Chamber Court-room transacting business pertaining to all Court offices besides the Bill Chamber, it is commonly found that the official hours cannot be adhered to. Unlike the Court of Session offices, the Bill Chamber is not closed on Whitsunday and Martinmas term days, s. 3 of the Court of Session Act, 1868, specially making this exception.

Subsection (7).—*Judges' Clerks.*

54. There are thirteen judges' clerks, each judge being allowed a personal clerk whose functions are to act as amanuensis, to have charge of the papers provided for the judge in each case before him, and (in the Outer House) to make up the daily and weekly rolls. The clerk of the Lord President and the clerk of the Lord Justice-Clerk are Keepers of the Inner House Rolls in the First and Second Divisions respectively, and are remunerated on a higher scale than are the other eleven judges' clerks. The clerk of the Lord President keeps the seal of the Court of Session, which is impressed on documents going out of the kingdom for official purposes, and he also keeps the Roll of Law Agents enrolled to practise in the Court of Session, receiving fees in cash for each impress of the seal and relative docquet, and for registration of each law agent. The Act of Sederunt, 23rd February 1687, as to privileges of members of the College of Justice, included in the catalogue of members of the College the Keepers of Inner and Outer House Rolls, but did not include the judges' clerks, or "servants" as they were then called, but certain persons were, though not members, allowed to enjoy the privileges of the College, and among these were "one actuall servant of each Lord of the Session." The judges' clerks are not commissioned officials, being appointed by the judges themselves, but their salaries are paid from Civil Service funds. Each clerk is entitled, on the death or resignation of his judge, to a pension out of a fund specially created by s. 15 of the Court of Session Act, 1821,[2] but no pension or grant comes to him in the event of his own retiral through sickness or infirmity. The Lord President's clerk and Keeper of the First Division Rolls, and the clerk to the Lord Justice-Clerk and Keeper of the Second Division Rolls, each receives a fixed salary of £450. Each other judge's clerk receives a salary of £250, rising to £350. Additional emoluments are received by all judges' clerks by providing copies of opinions delivered, and the Outer House judges' clerks also receive fees for notes of evidence taken in proofs but not in jury trials. These clerks may practise as law agents, but not in the Court of Session.[3]

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[1] C.A.S., E, i. 1 and 2. [2] 1 & 2 Geo. IV. c. 38.
[3] Act of Sederunt, 6th March 1783.

SUBSECTION (8).—*The Extractor.*

55. Since 1838 down to the present day there has been but one Extractor in the Court of Session, an official with a department of his own. In this department there are prepared and issued extracts of the decrees and acts pronounced by the several Courts constituting the Court of Session, but excluding the Bill Chamber and the Teind Court. In the early days of the Court's history the extracts were prepared and issued by the Clerks of Court, and an extract dated 11th May 1532 bears the signature of James Foulis, who would seem to have been the same individual who later, on 27th May, was officially appointed "clerk of registrie, rolls and of counsale." [1] By 1687 the preparation of extracts must have grown into a flourishing industry, for no less than twelve Extractors were included in the extension of the privileges enjoyed by members of the College of Justice, there being mentioned in the Act of Sederunt, 23rd February 1687, four Extractors in each of three clerks' offices of the Session. It may be that twelve did not exhaust the list, and in any case the Extractors did not occupy any high position, for they were not granted the status of members of the College; but they were allowed, with other minor employees, to enjoy the privileges peculiar to members. The growth of the extracting industry must have increased as years went on, for at the time of the passing of the Court of Session Act, 1810,[2] there were seventeen Extractors in the Court who were not paid by salaries but were employed by agents and paid by writings; and s. 13 of the statute abolished the separate office of Extractor, fixing compensation to be paid to these seventeen Extractors for loss of employment, and enacted that extracts should be prepared by Assistant Clerks of Session, they to have fixed salaries besides copying fees. Eleven years later, by the Court of Session Act, 1821,[3] the duty of extracting was again put on separate Extractors (four in number), who were to be nominated by the Principal Clerks of Session jointly, the senior Clerk, in the case of equality of votes, having a casting vote; and each Extractor's salary was fixed at £250 plus copying fees. Each extract was thereafter to be signed by the Extractor who prepared it instead of by one of the Principal Clerks as formerly.

56. In 1838, by the Court of Session Act (No. 2) of that year,[4] the system now in use was introduced, viz. the appointment of one Extractor, who on appointment receives his commission from the Crown. The Extractor has an assistant, appointed by himself, though his salary is paid by the Treasury, and he is empowered to employ a clerical staff, remunerated also by the Treasury. By a recent rearrangement of staff duties the Minute Book and Record of Edictal Citations have been put under charge of the Extractor, whose assistant performs the duties formerly discharged by the Assistant Keeper. The Extractor is under

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[1] Beveridge, Appendix No. 1, p. 1.
[2] 50 Geo. III. c. 112.
[3] 1 & 2 Geo. IV. c. 38, ss. 17, 19, and 20.
[4] 1 & 2 Vict. c. 118, s. 18.

the supervision of the Principal Clerk of Session. He must give his whole time to his duties, and must not engage in practice. His salary is £750 per annum, and there is an allowance of £60 in respect of Minute Book duties.

Subsection (9).—*The Keeper of the Minute Book and of the Record of Edictal Citations.*

57. The duties of Keeper are now discharged by the Extractor and his assistant.

The two offices of Keeper of the Minute Book and Keeper of the Record of Edictal Citations were conjoined by the Court of Session Act (No. 2), 1838.[1] The Court of Session Minute Book includes entries of proceedings in the Bill Chamber, and in each Court office there are written up daily, in a Minute Book applicable to each particular office, condensed entries of intimations of petitions and similar applications, and of acts and decrees pronounced in each Court, the entries giving the names of counsel and agents for the respective parties. The several separate Minute Books are collected by the Assistant Keeper of the Minute Book, who copies and arranges in order of date the items gathered from those books, which are then printed for publication. Lists of causes transferred from one Court or judge to another appear in the published Minute Book. There is an alphabetical index of entries in the Minute Book made up at the end of each year and published, and by consulting the index information can be obtained as to cases being searched for.

58. The Record of Edictal Citations contains entries of the copies of edictal citations, charges and intimations, requisitions and protests delivered to the Keeper at his office, with particulars as to time of service, nature of writs, names and designations of parties, and time of expiry of *inducicæ*. Three separate registers are kept—one for citations on summonses and orders for service against parties furth of Scotland in Court of Session proceedings; one for similar citations applicable to inferior Courts; and the third for all charges, intimations, and publications to persons furth of Scotland given by letters passing the signet (excepting summonses).[2] The registers are open for inspection, and the relative copy writs are kept for three years. The Keeper also prepares and publishes weekly abstracts of petitions for service, general and special, and of petitions for appointment of executors.[3] The Keeper was under the control of the Principal Clerk of Session, and, being now Extractor of the Court, still is under that control.

Subsection (10).—*Macers.*

59. There are seven macers in the Court of Session who execute the functions of ushers, their duties being to attend the Court, call the cases

[1] 1 & 2 Vict. c. 118, s. 21. [2] 6 Geo. IV. c. 120, s. 51. [3] 21 & 22 Vict. c. 56, s. 4.

in rolls for hearing, preserve silence and decorum in Court, take charge of witnesses and juries, and execute orders for taking into custody recalcitrant witnesses. They also apprehend and bring to the bar as prisoners persons charged with delict which falls under the cognisance of the Court. When captions are issued for non-return of borrowed processes or parts thereof, the Court orders macers to arrest the agent or clerk, or both, and if incarceration follows, they convey the prisoners to jail. In the Act of Sederunt of May 1532 the duties of "massaris" and their fees were regulated, and later their standing was deemed of sufficient importance to warrant their inclusion as members of the College of Justice, and as such to enjoy the privileges thereof.[1] They at one time exercised a peculiar jurisdiction, officiating as judges in special services, sitting in Edinburgh with one of the Lords, deputed by the Court, acting as assessor, and as a Court the macers granted commissions for proclaiming the brieves issued from Chancery and for summoning the jury and witnesses. The Court of Session Act, 1821,[2] put an end to this practice, and the macer's judicial functions were vested in the Sheriff-Depute of Edinburgh, and his substitutes as Sheriffs in that part specially constituted, whether the services related to lands in or beyond Edinburgh or in several sheriffdoms.

60. The macers are now paid by fixed salaries of £150 each, no fees being taken as formerly when the salary was £100 plus fees for witnesses examined. Six of the seven receive their appointments from the Crown, but one receives his appointment from the Marquis of Bute, who holds the right to appoint which was included in a feudal grant by James III. in 1483 to John Scrymgeour of the Barony of Byres. The Marquis of Bute becoming later possessed of that Barony and all rights thereto pertaining, the macer appointed receives his commission from him signed by his own hand, the office to be held "during all the days of his life." All seven macers are paid by the Crown and six qualify for pensions, but the Bute nominee gets no pension.[3]

61. The macers, who take their name from the maces borne by them when preceding the Lords in Court or at official functions, at one time seemed to have regarded those emblems of office as their own property, for a regular trade was done when macers died or demitted office, their successors paying substantial sums for the silver maces to the representatives of those deceased or to those retired, and among the transactions recorded there is the case of "Alexander Mitchell, who was named by Moncrieff of Readie, dying, his executors not finding a purchaser melted down the mace." Following on a report on this trafficking made by a committee of the Lords, the Court, in 1760, declared the maces to be the property of the Court.[4]

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[1] Act of Sederunt, 23rd February 1687.

[2] 1 & 2 Geo. IV. c. 38, s. 11.

[3] See *Moncrieff of Readie*, 1693, 1 Fountainhall 543, 553; *Gardner* v. *Grant*, 1835, 13 S. 664; *Bruce* v. *Grant*, 1839, 1 D. 583.

[4] Beveridge, i. 81, 82, 83.

62. The Court of Session macers are under the control of the Principal Clerk of Session, and on a requisition made by the Crown Agent the Principal Clerk may detail any disengaged macer to act in the High Court of Justiciary when required.[1] The Justiciary Court has two macers of its own.

SUBSECTION (11).—*The Auditor of Court.*

63. The first appointment of an Auditor of the Court of Session was made by Act of Sederunt, 6th February 1806, when Mr. Thomas Guthrie Wright, W.S., was appointed "Auditor of Accounts in the Court." The initial appointment was made by the Court after consideration of a report by the W.S. Society recommending improvements on the methods in use of stating accounts of expenses. While the Lords accepted the recommendations made, they only went the length of "thinking it expedient to make a trial of the plan proposed for a limited time," and limited the trial to a period of one year. But in practice, irrespective of Acts of Sederunt, the establishment of an Auditor became regarded as part of the machinery of the Court. Originally the Auditor's remuneration was by fees for each individual taxation, the Court fixing the amount should parties fail to agree thereon. This system continued until 1810, when, by the Court of Session Act of that year,[2] a definite tariff was provided, and it was also provided that, should there be two Auditors, one for each Division of the Court, there should be an equal division of fees. This statute assumed the existence of an Auditor or Auditors, but by the Court of Session Act, 1821,[3] it was definitely provided that the office of Auditor of Accounts should remain a permanent office in the Court of Session, that the holder thereof should retain the office *ad vitam aut culpam*, and that he should be a member of the College of Justice. The statute required that the person to be appointed Auditor should have been in practice as a Writer to the Signet or Solicitor in the Supreme Courts for not less than three years, and declared that the holder of the office should not engage in practice as an agent in the Court of Session, either directly or indirectly, under pain of deprivation of office. Power was, by the statute, reserved to the Crown to appoint an additional Auditor should it be certified by the Lord President and Lord Justice-Clerk that, in the opinion of the Court, due dispatch of business required two Auditors, and the Court was empowered, should an additional Auditor be appointed, to regulate by Act of Sederunt the duties of and division of fees between the two officers. In the case of illness or absence of the Auditor, provision was made for the Court appointing a fit and proper person to act *ad interim*, with no restriction on such person continuing to practise as a Court agent. From 1810 until 1838 the Auditor was remunerated by fees as provided by the

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[1] Clerks of Session Act, 1889, 52 & 53 Vict. c. 54, s. 11.
[2] 50 Geo. III. c. 112, s. 48, and relative schedule.
[3] 1 & 2 Geo. IV. c. 38, s. 32.

Court of Session Act, 1810,[1] but by the Court of Session Act, 1838,[2] the office was made a salaried one, and the salary was fixed at £700, which is still the figure, though an allowance is made for a clerk, which at present is £239 per annum.

64. The official business of the Auditor is to tax judicial accounts of expenses under remits made by the Court, and when reports are called for, his reports come before the Court for approval and decree. In the case of decrees in absence the Auditor's docquet or report requires no approval, the Extractor inserting the taxed amount in the extract.[3] In case either party means to object to the Auditor's report he shall, within forty-eight hours (after the date of the report), lodge a note of objections in process, intimating a copy to the other side, and enrol the cause in Single Bills or Motion Roll for discussion of the objections.[4]

65. Apart from his official duties, the Auditor is allowed to undertake taxations of extra-judicial accounts, and a considerable amount of business of the sort is transacted by him in the course of a year. Many remits are made to him because of his official position, and in addition to auditing private trust accounts, he taxes, on remits by the Junior Lord Ordinary, for the purposes of the Accountant of Court, the business accounts of law agents in factories and curatories.

Subsection (12).—*The Accountant of Court.*

(i) *General Duties.*

66. Supervision of the actings and intromissions of factors on the estates of pupils not having tutors, and of persons absent not having empowered anyone to act for them or who were under some incapacity, was formerly exercised by the Court itself; and by Acts of Sederunt of July 1690, 31st July 1717, and, notably, 13th February 1730, the fixing of liabilities of such factors, the finding of caution by them, and the regulation of their duties were put on a definite footing. Supervision of trustees and commissioners on sequestrated estates in bankruptcy proceedings was also exercised by the Court at its own hand. Bonds of caution and consignations likewise were under the control and custody of the Court through its Clerks of Session and their assistants. Judicial consignation receipts granted by chartered banks lay in the offices of the closet-keepers (assistant clerks), a very loose arrangement, until it was deemed wise to put all bonds of caution and consignation receipts under the custody of the senior Principal Clerk of Session.[5] This measure for security was taken sometime about the year 1802. Long prior thereto, however, the Court had applied its mind to the question of consigned money, for, by Ordinance of the Lords, dated 16th November 1733, it was provided "that hereafter all consigned money be put into the hands of

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[1] 50 Geo. III. c. 112.
[2] 1 & 2 Vict. c. 118, s. 24.
[3] 1 & 2 Geo. IV. c. 38, s. 33.
[4] C.A.S., K, i. 2 (*d*).
[5] Beveridge, vol. i. p. 438.

the principal clerks and find they have right to the dues of all consignations . . . whether in the Inner or Outer House." [1]

67. Not until 1849 was any real system introduced for keeping an adequate and continuing check on factors and curators,[2] and not until 1856 was a similar system inaugurated as regards control of trustees and commissioners in sequestrations.[3] In 1849 the Pupils Protection Act provided for the appointment of a person versant in law and accounts to be called the Accountant of the Court of Session (s. 9). The general nature of his duty was declared to be to superintend the conduct of all judicial factors and tutors and curators (s. 10). The Bankruptcy Act, 1856, s. 156, created the office of Accountant in Bankruptcy, the incumbent of which office should supervise the administration of sequestrated estates. The two offices of Accountant of Court and Accountant in Bankruptcy were conjoined by the Judicial Factors Act, 1889,[4] and since the conjunction the Accountant of Court has exercised sole jurisdiction over the actings of trustees and commissioners in bankruptcies, and of factors, tutors, and curators, whether appointed by the Court of Session or the Sheriff Courts, his jurisdiction as regards the latter having been created by the Judicial Factors (Scotland) Act, 1880.[5] By virtue of the Act of Sederunt, 15th July 1904, he has also taken over the duty of approving caution formerly exercised by the Principal Clerks of Session in factories and curatories, though approval of bonds in sequestrations and liquidations is specifically excepted from his consideration. All moneys consigned under orders of the Court (including the Bill Chamber) are, by the Court of Session Consignations Act, 1895,[6] put under the charge of the Accountant, who keeps a Consignation Book in form provided by Act of Sederunt.[7]

68. The office accommodation in New Register House includes the public office where the cashier and several clerks attend at the counter receiving processes brought up from the Bill Chamber and Court offices, bonds of caution for approval, and consignation receipts for safe custody. Bonds by liquidators and bonds of judicial caution, as for expenses, though not approved by the Accountant, are brought to the public office for safe custody. Bonds of caution are given up, and consignation receipts, endorsed, are delivered up under warrants granted by the Court; fees are collected (in Law Court stamps), and, in short, the public office is the main channel through which all matters pertaining to factories and sequestrations alike come and go. There is a complete record of bonds of caution and consigned moneys kept, and in January of each year the Accountant prepares and submits a list of approved guarantee companies for the consideration and approval of the Junior Lord Ordinary.[8]

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[1] Alexander's Abr. i. p. 65.
[2] Pupils Protection Act, 1849, 12 & 13 Vict. c. 51.
[3] Bankruptcy (Scotland) Act, 1856, 19 & 20 Vict. c. 79.
[4] 52 & 53 Vict. c. 39.
[5] 43 & 44 Vict. c. 4.
[6] 58 & 59 Vict. c. 19.
[7] C.A.S., G, iii. 1.
[8] C.A.S., G, i. 5 (*d*).

(ii) *Judicial Factory Department.*

69. Although by the Trusts (Scotland) Act, 1921,[1] certain rights and powers now applicable to trustees have been conferred on tutors, curators, and judicial factors, the provisions of the Judicial Factors (Scotland) Acts, 1849 to 1889, still apply to all judicial factors, including factors *loco tutoris*, factors *loco absentis*, and factors under s. 163 of the Bankruptcy (Scotland) Act, 1913,[2] and to all *curators bonis*, tutors-at-law, tutors-nominate, and guardians under the Guardianship of Infants Acts, 1886 and 1925;[3] and the provisions of s. 18 of the Factors Act, 1889, apply to testamentary trustees who, on their own application, have been placed under the supervision of the Accountant by the Junior Lord Ordinary. Annually the Accountant audits the accounts, settles the amount of commission, and issues reports in draft, calling, if required, for information on any points, and, when satisfied, signs and issues the reports.

70. Special powers sought by factors and curators, such as are not covered by the Trusts (Scotland) Act, 1921,[4] require a note to the Court (Junior Lord Ordinary), but before such note is presented the Accountant must have deliberated on the matter. With the inclusion of factors, tutors, and curators in the Trusts Act, 1921, the duties and powers as to investments and the classification of securities are now well defined.

71. Petitions for discharge of factors, etc., are presented to the Junior Lord Ordinary in the Bill Chamber. These applications require to be supported by a report by the Accountant, and discharge will be granted on evidence produced that the estate has been conveyed to those in right of it. In the case of a factor dying while the factory is still current, a new factor will be appointed by the Junior Lord Ordinary on application made by any interested party, or on the Accountant reporting the necessity to the Court.

72. A yearly report is made up by the Accountant concerning all factories and curatories under his supervision, which report is submitted to the First Division of the Inner House for approval, after which it is made available to all concerned for inspection for one year in the Accountant's office; and at the expiry of the year it is transmitted to the Record Room.

(iii) *Bankruptcy Department.*[5]

73. The Accountant becomes officially concerned with a sequestration when he receives from the Bill Chamber Clerk or the Sheriff-Clerk a certified copy of the first deliverance in sequestrations awarded (s. 156). The act and warrant issued to the trustee elected is the title to perform his duties, and a copy of this is sent by the Sheriff-Clerk to the Accountant, as provided by s. 70 of the Act. On election of a new trustee a copy of his act and warrant requires to be similarly transmitted to the Account-

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[1] 11 & 12 Geo. V. c. 58, s. 2.
[2] 3 & 4 Geo. V. c. 20.
[3] 49 & 50 Vict. c. 27, and 15 & 16 Geo. V. c. 45.
[4] 11 & 12 Geo. V. c. 58.
[5] See Bankruptcy (Scotland) Act, 1913, 3 & 4 Geo. V. c. 20.

ant (s. 71). The Accountant's powers and duties of controlling trustees and commissioners in bankruptcies are very fully and specifically set forth in many sections of the statute, but a convenient compendium of the provisions of the statute anent the Accountant's duties is to be found in the "Notes by the Accountant for the Guidance of Trustees in Sequestrations," dated 2nd January 1914, which appears in the Parliament-House Book, Division E.

(iv) *Remits by the Court.*

74. Sec. 9 of the Pupils Protection Act, 1849, authorised the Court or any Lord Ordinary to remit to the Accountant to report on any matter depending before such Court or Lord Ordinary, even though such matter was not connected with his official duties. That section was repealed by the Judicial Factors Act, 1889, s. 1, and the authorisation was not re-enacted. Nevertheless, on occasions there have been remits made by the Inner House to the Accountant in matters not connected with his official duties, and the fees paid to the Accountant have been paid in Law Court stamps in the same way as all fees are paid for official business in the Accountant's department.

(v) *Private References.*

75. References by individuals to settle matters of accounts and commission on cash transactions are frequently made to the Accountant, and the fees also are paid in Law Court stamps.

(vi) *Salary and Hours of Attendance.*

76. The Accountant's salary for whole-time service is £1200 per annum. The hours of attendance are from 9.30 a.m. to 4.30 p.m. except Saturday, and on Saturday from 9.30 a.m. to 1 p.m.

Subsection (13).—*The Deputy Keeper of the Signet.*

77. The Deputy Keeper is not, in fact, an official of the Court of Session. He is the President of the Society of Writers to the Signet, and his appointment comes from the Lord Clerk Register, the Keeper of the Signet, who appoints also the officers in the Signet Office.[1] The exclusive privilege of signing Court of Session writs, now known as summonses, letters of arrestment, letters of horning, and letters of inhibition, which pass the Signet was conferred on Writers to the Signet by Act of Sederunt, 30th July 1618, and the privilege has been carefully guarded down to the present day. Though the Signet is not, and was never, the Seal of the Court of Session, the Court has seen fit to exercise parental interest and control over it, several Acts of Sederunt concerning

[1] 42 & 43 Vict. c. 44, s. 3.

its construction, renewal, and use having been passed. The Writers to the Signet's privilege of signing letters to pass the Signet does not extend to letters of first and second diligence for summoning and compelling the attendance of witnesses for Inner House jury trials. These pass the Signet on being signed by the respective clerks of Court. Fees charged for signeting writs are paid by means of Law Court stamps. The Deputy Keeper of the Signet, though holding office by appointment direct from the Lord Clerk Register, receives a salary from the Crown of £350 per annum, and the members of the staff receive salaries from the same source.

Section 4.—College of Justice.

Subsection (1).—*Senators.*

78. The title of "Senators" was first used in the Act 1540, which ratified the institution of the College of Justice, and the title has been maintained by the Lords of Council and Session down to the present day. The courtesy judicial title of a senator is "Lord," and, while certain senators, on being elevated to the bench, have taken their seats with titles of territorial significance (*e.g.* Lord Meadowbank, who was Mr. Allan Maconochie), others have continued the use of their surnames prefixed by the title "Lord." At one time doubt existed as to the right of a retired senator to continue using the title "Lord." Moreover, as a senator's wife was not entitled to use the title "Lady," her position was somewhat anomalous when her husband had adopted a territorial title. These matters were put on a satisfactory and definite footing by Royal Warrant, dated 3rd February 1905, which ordained and declared that every Senator of the College of Justice in Scotland on his retirement should be entitled to retain the title of "Lord" with the prefix of "Honourable" enjoyed by him as a Lord of Session; and further, that the wife of every Senator of the College of Justice should be entitled to assume and use the title "Lady," and to continue to use the same during the life of her husband, and after his death, so long as she remains a widow.

Signing of interlocutors by territorial titles is only competent when the judge is of the Peerage, and an anomaly still exists when it is found that the signature to a judgment or order does not tally with the judicial title of the judge who signs.

79. The senators are appointed by the Crown, and by the 19th Article of the Treaty of Union the qualifications for appointment are service as advocate or Principal Clerk of Session for five years, or as Writer to the Signet for ten years, but a Writer to the Signet must undergo trials on Roman law and be found qualified two years before nomination. On receiving their commissions under the Great Seal the senators undergo formal trials before the Court prior to being admitted.[1] The salary of the Lord President is £5000 per annum, that of the Lord

[1] 10 Geo. I. c. 19, s. 1; C.A.S., A, i. 1.

Justice-Clerk £4800 per annum; and each of the other senators receives £3600 per annum. A retiring allowance of three-fourths salary is earned by fifteen years' service, or it may be granted on account of permanent disability.[1]

80. It would seem that the chairman of the Land Court is not entitled to be described as a "senator" although he is declared to have the same rank and tenure of office as if he had been appointed a judge of the Court of Session.[2] The Land Court is a distinct and separate tribunal quite outside the College of Justice, and while the Small Landholders (Scotland) Act, 1911, put the chairman on the footing of a Court of Session judge, it made no mention of including him among the Senators of the College of Justice.

Subsection (2).—*Members.*

81. The College of Justice is a collective name given to those persons who take part in the administration of justice in the Court of Session.[3] According to an Act of Sederunt passed on 23rd February 1687 the following declaration was made as to what persons were members of the College of Justice, viz.: "The Lords of Session, advocats, clarks of session, the clarks of the Bills, the wryters to the signet, the deputs of the clarks of session who serve in the Outer House and their substitutes for registrationes, being one in each clark's office, the three deputs of the clarks of the Bills, the clarks of the Exchequer, the directors of the Chancellary, their deput and two clarks thereof, the wryter to the Privy-seall and his deput, the clarks of the generall registers of sasines and hornings, the macers of the session, the keeper of the minute book, the keepers of the rolls of the Inner and Outer House." This Act of Sederunt was in the form of the interlocutor pronounced giving judgment against the town of Edinburgh in an action of declarator and suspension raised by the members of the College of Justice anent privileges claimed for immunity from paying cess and city imposts. The Act concluded by extending the privileges declared as applying to members to certain servitors of minor degree, without, however, declaring such to be actually members. The extension was as follows: "And the Lords do extend the priviledges foresaid to the persones following, viz. one actuall servant of each Lord of the Session, one servant of each advocat, four extractors in each of the three clarks' offices of the Session, two servants employed by the clark of register in keeping the publick registers, the keeper of the Session-house, and the keeper of the advocats' library. It is always hereby declared That if any of these servants, and others to whom the foresaid priviledges are extended shall keep merchant-shops, tavernes or alehouses, or exercise any other trade within the burgh, they shall not enjoy any of the priviledges above mentioned."

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[1] 48 Geo. III. c. 145, s. 1.
[2] 1 & 2 Geo. V. c. 49, s. 3 (2).
[3] Mackay's Prac. i. 84.

82. The Auditor of the Court of Session was, in 1821, declared to be a member of the College of Justice.[1] The Accountant of Court, whose office in its present form was created by the Judicial Factors (Scotland) Act, 1889,[2] has not been declared to be a member of the College. The chairman of the Land Court is a member, but only because of his being a member of the Faculty of Advocates.

Subsection (3).—*Former Privileges of Members.*

83. Certain valuable privileges were enjoyed at one time by members of the College of Justice because of their being denied opportunities of following pursuits more lucrative through being tied down to daily attendance in Court. A general exemption from local taxation was conferred by statute.[3] Members accordingly enjoyed immunity from local taxation, poor rates, ministers' stipends, watching and warding, customs, causeway mails, shore dues, and imposts on goods carried into or out of the city. They had also a right to sue and be sued exclusively in the Court of Session.[4] This privilege extended even to actions otherwise excluded from Court of Session jurisdiction,[5] and privilege required to be pleaded. So recently as 1907 it was considered necessary to put the abolition of this privilege beyond doubt, for the Sheriff Courts Act, by s. 10, declares that no person shall be exempt from the jurisdiction of the Sheriff Court on account of privilege by reason of being a member of the College of Justice. The reason why it was deemed necessary to insert this declaration would seem to have been because of the repeal by the 1907 Act of s. 48 of the Sheriff Courts Act, 1853.[6] Sec. 48 of this Act had already abolished the privilege, and evidently it was assumed that, the section being repealed, the privilege would revive. As regards the exemption from local taxes, etc., it applied only to members and exempts enjoying the extension who were indwellers of the city, excepting those living in Leith, Edinburgh's vassal, who escaped pier and shore dues. The privilege of exemption from taxes, etc., has been allowed to fall into desuetude.

Section 5.—Books of Court.

Subsection (1).—*Books of Sederunt.*

84. The Court of Session Book of Sederunt is a minute book kept in the First Division by the Depute Clerk, and in it are recorded all particulars relating to the installation of new judges, the swearing in of law officers of the Crown, the Acts admitting advocates, the commissions

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[1] 1 & 2 Geo. IV. c. 38, s. 32.

[2] 52 & 53 Vict. c. 39.

[3] Acts 1532, c. 68; 1540, c. 93; 1599, c. 281; 1661, c. 23; Act of Sederunt, 23rd February 1687.

[4] Act of Sederunt, 19th February 1537; Acts 1555, c. 39; 1587, c. 42; 1672, c. 16; Balfour's Pract. 270; Stair, iv. 142.

[5] *Bruce* v. *Clyme*, 1833, 11 S. 313.

[6] 16 & 17 Vict. c. 80.

of clerks of Court and other Court officials, Acts of Sederunt, minutes of Court, and transfers of causes. When each volume is completed it is sent to the Record Room, H.M. Register House, where is kept a complete set of the Books of Sederunt from 1626 onwards, and an incomplete set for the period prior to 1626 back to 1553. In each Division of the Inner House there is kept, by the Depute Clerk, a Sederunt Book in which daily entries are made of the names of the judges constituting the bench. These books also, on completion, are sent to the Record Room for custody.

SUBSECTION (2).—*Books of Council and Session.*

85. These books are to-day what in olden times were known as the "Buikis of Counsale," wherein were registered for execution as well as for preservation deeds bearing clauses consenting to such registration, the presence of a judge being necessary to grant the warrant craved by a procurator named in a deed. In 1670, by Act of Sederunt 9th December, the appearance and even a signed consent of a procurator were dispensed with. The exact date of the discontinuance of a judge's presence is a matter of doubt. The effect of registration for execution was, and is, that the extract taken furth of the books is of the same force as an extract decree of the Court of Session, and warrants the execution of all lawful diligence thereon. The books of to-day, known popularly as the Books of Council and Session, are the Registers of Deeds and Probative Writs kept at the Register House, wherein deeds and writings containing warrants consenting to registration may be recorded for preservation and execution, or with consents to register for preservation only and (without any such consents) for preservation. Bills of Exchange and Promissory Notes were included in the catalogue of registrable writs for execution by the Act 1681, c. 20, and several later Acts, consent to registration for preservation and execution being held as implied by signature and acceptance. Once registered, a deed or writ is cloistered for all time except that inspection may be had of it at the Register House, or, under warrant of the Court, exhibition of it may be made in Court by an official custodier.

SECTION 6.—JURISDICTION.

SUBSECTION (1).—*Jurisdiction over Persons.*

(i) *Petitory Actions.*

86. In ordinary petitory actions the Court of Session has jurisdiction *ratione domicilii* over all persons who have been resident in Scotland continuously in one locality for the period of forty days [1] so long as they remain in Scotland.[2] Mere presence in Scotland is not a ground of jurisdiction except in the case of an itinerant defender who has no fixed residence anywhere.[3] The Court has also jurisdiction in petitory actions

[1] *Joel* v. *Gill*, 1859, 21 D. 929, per Lord President Inglis at p. 938.
[2] *Buchan* v. *Grimaldi*, 1905, 7 F. 917.
[3] *Linn* v. *Casadinos*, 1881, 8 R. 849.

(1) where the action is one founded upon a contract which was made or is to be performed in Scotland and the defender has been personally cited in Scotland; (2) where the action is founded on a delict or *quasi*-delict committed in Scotland and the defender has been personally cited in Scotland; (3) where the defender owns heritage in Scotland; (4) where arrestment has been made in Scotland in the hands of a third party of moveables belonging to the defender. In such a case the Court has jurisdiction to entertain an action between parties, all of whom are foreigners, but the action may be dismissed on the ground of *forum non conveniens*;[1] (5) where the defender has been arrested on a *meditatio fugæ* warrant; (6) where a ship of which the defender is owner has been arrested in territorial waters in Scotland; (7) where the defender has prorogated the jurisdiction; and (8) *ex reconventione* in matters having a direct connection with an action raised in Scotland by the defender, the respective claims being of the same nature and capable of being the subject of one judgment or of contemporaneous or nearly contemporaneous judgments.[2]

(ii) *Actions affecting Status.*

87. In actions of divorce, separation and aliment, and adherence, the Court has jurisdiction where the domicile of succession of the husband is in Scotland,[3] or was there at the date when the cause of action arose,[4] and also possibly *ex necessitate* in actions of divorce where the husband has obtained a decree of nullity of marriage from a foreign Court upon grounds not recognised by our law, and the wife's domicile is in Scotland.[5] In actions of separation and aliment it is thought that the Court has also jurisdiction if the spouses are both resident in Scotland, or if the wife is resident there and requires protection from her husband there.

In actions of declarator of marriage, of declarator of nullity of marriage, and of putting to silence, it is thought that the Court of Session has jurisdiction if the domicile of the man be in Scotland, and that whether he be pursuer or defender.[6] The Court has jurisdiction to entertain a declarator of a marriage celebrated in Scotland if the defender has been personally cited there,[7] and a declarator of nullity of a marriage celebrated in Scotland if the defender is resident in Scotland, not on a temporary visit or one made for the purpose of the action.[8]

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[1] *Société du Gaz de Paris* v. *Société Anonyme de Navigation*, 1925 S.C. 332.

[2] *Thompson* v. *Whitehead*, 1862, 24 D. 331.

[3] *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517.

[4] *Redding* v. *Redding*, 1888, 15 R. 1102; *Hood* v. *Hood*, 1897, 24 R. 973; *Manderson* v. *Sutherland*, 1899, 1 F. 621; *Ramsay* v. *Ramsay*, 1925 S.C. 216.

[5] *Ogden* v. *Ogden*, [1908] P. 46, at p. 82; *Stathatos* v. *Stathatos*, [1913] P. 46; *De Montaigu* v. *De Montaigu*, [1913] P. 154.

[6] *C. B.* v. *A. B.*, 1884, 11 R. 1060; 12 R. (H.L.) 36; Fraser, H. & W. ii. 1271; Duncan and Dykes on Jurisdiction, p. 189.

[7] *Wylie* v. *Laye*, 1834, 12 S. 927; *Murison* v. *Murison*, 1923 S.C. 624.

[8] *Miller* v. *Deakin*, 1912 (O.H.), 1 S.L.T. 253; *Wilson* v. *Horn*, 1904 (O.H.), 41 S.L.R. 312; 11 S.L.T. 702.

In actions of adherence, residence of both parties in Scotland may be a ground of jurisdiction although their domicile is elsewhere.[1] It is thought that the same applies to actions for permanent aliment if the husband has been resident in Scotland for such time as would render him subject to the jurisdiction in an ordinary personal action.[2] A Scottish domicile of origin, together with personal citation, is not enough.[3] In actions dealing with custody of and access to children there is jurisdiction against all parents who are domiciled in Scotland. The Court will also regulate custody of and access to children of parents resident in Scotland although not domiciled there, provided that an order has not already been made by the Court of the father's domicile;[4] but it will not deal with access to children of a foreigner who is not resident in Scotland.[5] It is thought that the Court has jurisdiction to try the question of the legitimacy of any person who is domiciled in Scotland.

(iii) *Actions in rem.*

88. The Court of Session has sole jurisdiction to entertain actions disposing of immoveable property which is situated in Scotland.[6] Moreover, a decree *in rem* with regard to moveable property situated in Scotland, *e.g.* in a multiplepoinding (in which the fund *in medio* is brought into Court), is effectual against all persons interested therein.[7]

(iv) *Interdicts.*

89. The Court of Session has jurisdiction to deal by way of interdict with any respondent where the wrong apprehended or in process of being committed is in Scotland.[8] But if the real question is whether the respondent has the right to perform the act complained of anywhere, including Scotland, and the parties are both foreigners, the Court may refuse to deal with the question on the ground of *forum non conveniens*.[8] In this class of action residence in Scotland or the ownership of property there, whether moveable or immoveable, or the fact that the respondent is litigating in the Courts of Scotland, are good grounds of jurisdiction.[9]

(v) *Other Common Law Proceedings.*

90. In actions of declarator and reduction, the ordinary grounds of jurisdiction obtain which are appropriate to the subject-matter of the action. But arrestment *ad fundandam jurisdictionem* will not be

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[1] *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517.
[2] *Le Mesurier, supra; M'Neill* v. *M'Neill*, 1919 (O.H.), 2 S.L.T. 127.
[3] *Tasker* v. *Grieve*, 1905, 8 F. 45. [4] *Westergaard* v. *Westergaard*, 1914 S.C. 977.
[5] *Barkworth* v. *Barkworth*, 1913 S.C. 759. [6] Ersk. Inst. i. 2, 17.
[7] *Miller* v. *Ure*, 1838, 16 S. 1204; *Crockart* v. *Dundee and Arbroath Rly. Co.*, 1852, 15 D. 202.
[8] *Toni Tyres, Ltd.* v. *Palmer Tyres, Ltd.*, 1905, 7 F. 477.
[9] *Dawson's Trs.* v. *Maclean*, 1860, 22 D. 685; *California Redwood Co.* v. *Merchant Banking Co. London*, 1886, 13 R. 1202; *Lindsay* v. *Paterson*, 1840, 2 D. 1373; *Young* v. *Barclay*, 1846, 8 D. 774; *Liqrs. of Pacific Coast Mining Co.* v. *Walker*, 1886, 13 R. 816.

sustained as a ground of jurisdiction in actions of declarator,[1] nor, it is thought, in actions of reduction.[2] The Court of Session has jurisdiction against trustees and executors where the trust is one constituted in Scotland and to be executed there,[3] where the trust concerns Scottish heritage [4] and where the trustees are resident in Scotland or have taken out confirmation there.[5] The Court of Session has jurisdiction to appoint a guardian to any pupil or incapax who is domiciled in Scotland or resident there.[6] The Court, however, will not appoint a guardian to a foreigner to whom a guardian has already been appointed by the Court of his domicile, unless the ward is possessed of Scottish heritage.[7]

(vi) *Bankruptcy and Liquidation of Companies.*

91. In terms of the Bankruptcy statutes the Court has jurisdiction in sequestrations where the debtor, at the date of the petition for sequestration, or, in the case of a deceased debtor, at the date of his death, was subject to the jurisdiction of the Scottish Courts.[8] But this has been interpreted to mean that he was so subject on a universal ground of jurisdiction.[9] Accordingly, the only grounds of jurisdiction recognised have been (1) residence for forty days in Scotland, and (2) the ownership of heritable property in Scotland.[10] Where a debtor is made bankrupt in different countries, in each of which he has a domicile, the Court of the country in which he is first made bankrupt has jurisdiction to distribute the bankrupt estate.[11] A foreigner who lodges a claim in a Scottish sequestration thereby becomes subject to the jurisdiction of the Scottish Courts *ex reconventione*.[12]

92. The Court of Session has jurisdiction to wind up companies registered in Scotland,[13] unregistered companies whose principal place of business, or one of whose principal places of business, is in Scotland,[14] and railway companies whose lines are authorised to be made in Scotland.[15]

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[1] *Longworth* v. *Hope*, 1865, 3 M. 1049, per Lord President M'Neill at p. 1053; *Trowsdale's Tr.* v. *Forcett Rly. Co.*, 1870, 9 M. 88; *Williams* v. *Royal College of Veterinary Surgeons*, 1897, 5 S.L.T. 208.

[2] See Maclaren, Court of Session Practice, p. 64.

[3] *Kennedy* v. *Kennedy*, 1884, 12 R. 275, per Lord M'Laren at p. 282; *Robertson's Trs.* v. *Nicholson*, 1888, 15 R. 914; *Ashburton* v. *Escombe*, 1892, 20 R. 187.

[4] *Mackay* v. *Mackay*, 1897, 4 S.L.T. 337.

[5] *Orr-Ewing's Trs.* v. *Orr-Ewing*, 1885, 13 R. (H.L.) 1; *Brown* v. *Maxwell's Exrs.*, 1883, 10 R. 1235; *Mags. of Wick* v. *Forbes*, 1849, 12 D. 299; but see *Robson* v. *Walsham*, 1867, 6 M. 4.

[6] *Marchetti* v. *Marchetti*, 1901, 3 F. 888.

[7] *Buchan* v. *Harvey*, 1839, 2 D. 275; *Lamb, Petr.*, 1858, 20 D. 1323; *Sawyer* v. *Sloan*, 1875, 3 R. 271.

[8] 3 & 4 Geo. V. c. 20, s. 11.

[9] Maclaren, Court of Session Practice, p. 67.

[10] *Joel* v. *Gill*, 1859, 21 D. 929; *Croil, Petr.*, 1862, 1 M. 509; *Goetze* v. *Aders*, 1874, 2 R. 150.

[11] *Phosphate Sewage Co.* v. *Molleson*, 1878, 5 R. 1125, per Lord President Inglis at p. 1138; *Orr-Ewing* v. *Orr-Ewing's Trs.*, 1884, 11 R. 600, at p. 635.

[12] *Barr* v. *Smith & Chamberlain*, 1879, 7 R. 247.

[13] 8 Edw. VII. c. 69, ss. 135, 136. [14] *Ibid.*, s. 267. [15] *Ibid.*, s. 268.

SUBSECTION (2).—*Jurisdiction in Causes.*

93. In its early days the jurisdiction exercised by the Court of Session was almost unlimited as regards the nature of the causes it might entertain, but that jurisdiction has been considerably circumscribed by modern legislation. By statute many proceedings are excluded from the jurisdiction of the Court of Session and are relegated to inferior Courts. Thus, for example, the Inner House may review decisions of arbitrators under the Workmen's Compensation Acts, but may not award, assess, or refuse compensation; it may review a Sheriff's judgment in bankruptcy proceedings, but it may not grant or refuse applications under the Bankruptcy Act; it may review decisions of Dean of Guild Courts, yet it cannot grant or refuse linings or impose penalties for breach of building regulations; it may review Sheriff Court decisions in ejections, but cannot grant an ejection order; it can review decisions of the Sheriff of Chancery or Sheriffs in petitions for service as heir, yet it cannot grant (nor, strictly speaking, has it the right to refuse) services; and it cannot review Small Debt Court decisions. The Court of Session has, however, inherent jurisdiction in all Court causes unless its jurisdiction is expressly or by implication excluded. Where other tribunals are not competent, the Supreme Court is the proper *forum*. Even when review of the judgments of inferior Courts by way of appeal is excluded, the Court of Session may, in effect, review their judgments by way of suspension or reduction where excess of jurisdiction or oppression is complained of.

SUBSECTION (3).—*Privative Jurisdiction.*

94. The following classes of action are exclusively appropriated to the Court of Session: (1) Exchequer causes. (2) Teind causes. (3) Actions as to status of persons, including divorce, legitimacy, and marriage; but while all actions which involve a determination of a right of status must be brought in the Court of Session, the Sheriff may entertain actions of aliment or of separation and aliment and for regulating the custody of children.[1] (4) Actions against the Crown. (5) Reduction. Although actions of reduction are not competent in the Sheriff Court, the Sheriff may set aside a deed *ope exceptionis* in an action before him.[2] The Sheriff may also, as arbitrator under the Workmen's Compensation Acts, set aside agreements between employer and employee when satisfied that these have been induced by fraud or undue influence.[3] Deeds by notour bankrupts may be set aside by the Sheriff under the Bankruptcy Act.[4] (6) Applications involving the exercise of the *nobile officium*. (7) Adjudications, excepting adjudications *contra hæreditatem jacentem*, which may be entertained in the Sheriff Court,[5] but such actions are usually raised in the Court of Session. (8) Suspension, when the amount involved is over £50. (9) Proving the tenor, this not having been

[1] 7 Edw. VII. c. 5 (2).
[2] 7 Edw. VII. c. 51, Sched. I., Rules 50 and 51.
[3] 15 & 16 Geo. V. c. 84.
[4] 3 & 4 Geo. V. c. 20.
[5] Ersk. ii. 12, 53.

specifically included in the Sheriff Courts Act, 1907. (10) Setting up deeds informally executed.[1] (11) Cognition of the insane. (12) Petitions appropriated by statute to the Court of Session. (13) Special cases for the opinion, or for the opinion and judgment, of the Court. (14) Civil jury trials, except in claims for damages by employee against employer raised in Sheriff Courts.[2] (15) Choosing curators when the next-of-kin are furth of Scotland.[3]

Subsection (4).—*Jurisdiction excluded.*

(i) *Criminal.*

95. A criminal jurisdiction was at one time conferred on the Court by statute,[4] giving it the right to punish perjury and subornation of perjury occurring in course of processes, contravention of law burrows,[5] deforcement of officers of the law,[6] breach of arrestment,[7] clandestine marriage,[8] and certain other offences; but, though not repealed, this jurisdiction has for long been in desuetude. Since the remodelling of the Court of Justiciary in 1672 the Court of Session has been relieved of exercising functions peculiar to a criminal Court; but certain powers remain in the Court to exercise such functions to a modified extent. Thus, breach of interdict is a crime which the Court can and does punish by fine or imprisonment, or both, the proceedings being by petition and complaint with the Lord Advocate's concurrence. Also, malversation by Court officials may be dealt with by the Court and punished by fine or removal from office. Punitive power lies with the Court in cases involving failure to obtemper decrees *ad factum præstandum*, non-payment of alimentary decrees and debts due to the Crown, and failure to obey orders in bankruptcy proceedings. While breach of interdict is regarded as a crime, being an open flouting of the Court's authority, it is sometimes described as an act of contempt of Court. Less overt acts are considered to constitute contempt of Court, and the Civil Court can exercise its powers to punish such offences as comment in the press on matters *sub judice*, tampering with or threatening witnesses, failure to obey citations of witnesses, destruction of productions, insulting or threatening judges or officers of Court. The mode of testing the distinction between civil and criminal jurisdiction was provided by the Summary Procedure Act, 1864 [9] (now repealed), the jurisdiction being deemed to be criminal when, in pursuance of a conviction or judgment upon a complaint, or part of such conviction or judgment, the Court is required to pronounce sentence of imprisonment or fine with alternative of imprisonment for non-payment, all other proceedings by way of complaint being held as civil.

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[1] 37 & 38 Vict. c. 94. s. 39.
[2] 11 Geo. IV. and 1 Will. IV. c. 69, s. 1; 7 Edw. VII. c. 51, s. 31.
[3] Act 1555, c. 35; Act 1672, c. 2 (12th ed.).
[4] Act 1555, c. 47 (12th ed.).
[5] 1581, c. 117, and 1593 c. 170 (12th ed.).
[6] 1581, c. 118; 1592, c. 152 (12th ed.).
[7] 1581, c. 118 (12th ed.).
[8] 1661, c. 34 (12th ed.).
[9] 27 & 28 Vict. c. 53.

(ii) *Ecclesiastical Causes.*

96. Sentences of Church Courts are not subject to review by the Court of Session, except where the Church Court has acted maliciously or in excess of its jurisdiction, or interference with civil right is involved. (See CHURCH.)

(iii) *Causes of Small Value.*

97. Except in the case of a foreign defender,[1] causes of value less than £50 cannot be raised in or appealed to the Court of Session. The test of value is the sum sued for. But a Sheriff may certify a cause of £50 or less value as suitable for appeal.[2]

(iv) *Peerage Claims.*

98. These are appropriated exclusively to the Committee of Privileges of the House of Lords.

(v) *Small Debt Appeals.*

99. These the Court may not deal with unless the cause has been remitted to the ordinary roll in the Sheriff Court, and leave to appeal is granted by Sheriff.[3]

(vi) *Summary Removings.*

100. Appeals may only be considered when the defender has lodged answers and found caution in the Sheriff Court.[4]

(vii) *Heraldry Cases.*

101. Cases of heraldry are exclusive to the Lyon Court, but appeal to and suspension by the Court of Session are competent though no operative decree may be given by the latter. (See HERALDRY.)

SECTION 7.—FEE-FUND DUES.

102. In many old Acts of Sederunt anent procedure there are to be found declarations as to fees in cash to be exigible by Court and other officials for various items of business done in connection with litigations. In the Articles of Regulation concerning the Session, 1695, Article 9 provided for a collector of dues being nominated by the Lords, which collector's duty was to be the ingathering of all fees to form an annual fund for division among the clerks, extractors, and the collector himself. Article 8 prohibited the principal or under clerks from taking "drink money," and in Articles 1, 2, 3, 7, 12, and 24, certain fees for various items of work were specified. Also, in the Additional Articles, 1696, Articles

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[1] *Brown* v. *Couper*, 1852, 24 Sc. Jur. 646; *Macbeth* v. *Innes*, 1873, 11 M. 404.
[2] 7 Edw. VII. c. 51, s. 28 (1) (*d*).
[3] *Ibid.*, s. 48.
[4] *Ibid.*, Rule 122.

4 to 10 made supplementary regulations as to fees to be taken in by the collector. It is doubtful if the good intentions manifested in the Articles of preventing and restraining abuses and exorbitant exactions in the Session were rewarded by successful results, for the history of the Court long subsequent to 1696 was marked by rapacities and exactions on the part of officials not content with the emoluments fixed for them.

103. In 1810 fee-fund dues were created by the Court of Session Act, of that year,[1] and a schedule appended to the statute was the forerunner of the modern system of taking Court dues. The office of Collector of Dues was established, that officer being appointed by the Lord President, and, by s. 24, provision was made for annual audit by an accountant to be nominated by the Lord President. Writs to be lodged had first to be taken to the collector, who put a marking thereon that the appropriate dues had been paid, and without such marking the clerks were prohibited from receiving the writs. The Court of Session Act, 1838,[2] by a schedule provided a new table of Court dues which were collected in cash until 1873, when collection by stamps was introduced by virtue of provision made therefor five years previously by the Courts of Law Fees Act, 1868.[3] The Commissioners of the Treasury had, during the five years, been pondering the provision made by the statute allowing the stamp system to be introduced. A fee fund, separate from that of the Court of Session, had been created for factory business, with the Accountant of Court as collector, by the Pupils Protection Act, 1849,[4] but this was abolished by the Judicial Factors Act, 1889,[5] and fees in stamps have been collected since the latter year in the Accountant's department.

104. A later Courts of Law Fees Act came into force in 1895,[6] which empowered the High Court of Justiciary and the Court of Session to regulate Court fees by Act of Adjournal and Act of Sederunt respectively, with approval of the Treasury. An Act of Sederunt was passed on 18th December 1896 giving a table of Court of Session dues, and an Act of Adjournal of the same date providing a table of dues for the Justiciary Court, in both cases the dues being declared payable entirely in Law Court stamps. The Justiciary Court table is still in force, but, by Act of Sederunt, 20th July 1922, a new Court of Session scale of dues was provided, the distinguishing feature thereof being increase in every item except Accounts of Expenses. A separate Act of Sederunt had been passed on 16th July 1897 fixing dues exigible in stamps in the Accountant of Court's department under authority of the Judicial Factors Act, 1889, but the Act of Sederunt of 20th July 1922 included a new scale for that department.

105. The Crown departments are exempted from payment of Court dues, though in litigated cases they do pay them like other litigants. In

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[1] 50 Geo. III. c. 112, s. 20.
[2] 1 & 2 Vict. c. 118.
[3] 31 & 32 Vict. c. 55.
[4] 12 & 13 Vict. c. 51, s. 39.
[5] 52 & 53 Vict. c. 39, s. 16.
[6] 58 Vict. c. 14.

ex parte applications, however, the exemption is observed. Litigants *in forma pauperis* are exempt from paying dues, but, when they are successful and expenses are recovered, the agents for the poor are bound to pay in stamps the dues which, though not actually paid, have been charged in their accounts. A Lord Ordinary is allowed in his discretion to order a refund of Court dues to one or other or both of the litigants in consistorial causes, though they be not on the Poor's Roll.

COURT OF TEINDS.

See CHURCH; TEINDS.

COURTESY.

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Section 1.—Definition.

106. The courtesy of Scotland was formerly the right of a surviving husband to a liferent of the heritage in Scotland in which his wife died infeft. The right still exists, but its extent has been modified by modern legislation. It is conditional on there having been a child of the marriage which survived its birth, was heard to cry, and was, for however short a time, its mother's heir.[1] Prior to 1874 it did not apply to lands which the wife took by singular succession, except when she was *alioquin successura*.[2] But this distinction disappeared as the result of the abolition by the 1874 Act of the distinction between fees of heritage and fees of conquest.[3] The right did not extend to lands to which she had only a personal title or to lands held by trustees under instruction to convey to her.[4] If a wife who had sold her heritage died before the purchaser was infeft, the husband's right to courtesy remained.[5] And it was not lost if it turned out, after the wife's death, that her title had been incorrectly made up, provided she had the radical right.[6]

Section 2.—Conditions of the Right.

107. The child must have been heard to cry, and medical evidence of the birth of a living child is not sufficient unless crying be averred and proved.[7] But it is thought that this rule would not be rigidly

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[1] General Authorities.—Craig, ii. 22, 40; Stair, ii. 6, 19; Ersk. ii. 9, 52; Bell, Com., 7th ed., i. 60; Bell's Prin., s. 1606; Fraser, H. & W. ii. 1118; Walton, H. & W., 2nd ed., 234.

[1] Reg. Maj. ii. 58, 1; see *Hodge* v. *Fraser*, 1740, Mor. 3119.

[2] Stair, ii. 6, 19; Fraser, H. & W. ii. 1118 *et seq.*

[3] 37 & 38 Vict. c. 94, s. 37; *Walker* v. *Walker's Trs.*, 1917 S.C. 46.

[4] *Clinton* v. *Trefusis*, 1869, 8 M. 370; *Porteous* v. *Bell*, 1757, 5 Bro. Supp. 855; *Hamilton* v. *Boswell*, 1716, Mor. 3117; affd. Robertson's App. 192.

[5] *Rossborough's Trs.* v. *Rossborough*, 1888, 16 R. 157.

[6] *Hamilton, supra.*

[7] *Roberton* v. *Moderator of General Assembly*, 1833, 11 S. 297.

applied if the child had survived for a considerable time any more than it would be in the case of a child who was dumb.[1]

108. The child must be at some time its mother's heir. If the wife is survived by a son of a former marriage, the husband's courtesy is excluded.[2] If the son of the former marriage predeceases the mother, so that a son of the last marriage becomes the heir, the right to courtesy arises,[3] and it may possibly do so if the son of the former marriage survives his mother but dies before his title is made up. If the mother is survived by daughters only of both marriages, the husband will have courtesy only of the lands to which his own daughters succeed as heirs-portioners.[3] If a child of the marriage was heard to cry, and was at any time the heir, it is immaterial that it died the moment after its birth.[4] A child legitimated by subsequent marriage, if the heir, would seem to satisfy the condition.[5]

Section 3.—Measure of the Right.

109. Prior to the passing of the Conveyancing (Scotland) Act, 1924,[6] the measure of the husband's right was the wife's infeftment. Under the 1924 Act the widower's right has been extended to all estate to which his deceased wife, dying after 15th January 1925, had a personal title capable of being completed by infeftment or by being recorded in the appropriate Register of Sasines (including heritable estate held in trust for her behoof), and out of which, if her title had been so completed, he would have had a right of courtesy. On the other hand, the right is now excluded from land which has been absolutely disponed by the wife for onerous consideration, although the disponee's title had not been completed at her death.

110. Courtesy extends over the wife's heritable bonds,[7] but not to those which have been absolutely assigned for onerous consideration by a wife who dies after 1st January 1925, although the title of the assignee has not been complete prior to her death. No widower whose wife has died after said date is entitled to claim courtesy in competition with a creditor of his wife. The right extends to feu-duties,[8] but not, it would seem, to casualties.[9]

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[1] Stair, ii. 6, 19; Ersk. ii. 9, 53; Fraser, H. & W. ii. 1121; *Roberton, supra*; see *Dobie*, 1765, Mor. 6183. Per Lord Glenlee in *Roberton, supra*.

[2] *Darleith* v. *Campbell*, 1702, Mor. 3113; Ersk., *loc. cit.*; Fraser, *loc. cit.*; Bell, Com., 7th ed., i. 60.

[3] Fraser, *loc. cit.*; see More, Notes to Stair, 219, and 37 & 38 Vict. c. 94, s. 9.

[4] Stair, Ersk., Fraser, *loc. cit.*; *Stewart* v. *Irvine*, 1632, Mor. 3112 and 6181.

[5] Fraser, *loc. cit.*; Bell's Prin., s. 1606; see *Crawfurd's Trs.* v. *Hart*, 1802, Mor. 12698.

[6] 14 & 15 Geo. V. c. 27.

[7] 31 & 32 Vict. c. 101, s. 117.

[8] *Clinton* v. *Trefusis*, 1869, 8 M. 370.

[9] Fraser, *loc. cit.*; Bankt. ii. 6, 20.

Section 4.—How Constituted.

111. The husband's right to courtesy vests *ipso jure*,[1] no service or other form of making up title being required.

Section 5.—How Excluded.

112. Courtesy is excluded by the alienation of the subjects or securities, or by real burdens, so far as these extend, and since 1st January 1925 by the claims of the creditors of a wife dying after that date; also by the husband's express renunciation in a marriage contract or otherwise, but not by his acceptance of a conventional provision.[2]

The right is personal to the husband, and rents or fruits not levied by him cannot be demanded by the heir.[3]

The right to courtesy is lost by the husband's divorce,[4] but not by his marrying again.[5]

An alien husband, not naturalised, had formerly no claim to courtesy.[6] But as this rested on his incapacity to hold land in fee or liferent, the effect of s. 2 of the Naturalisation Act, 1870,[7] probably is to remove the disability.

Section 6.—Liabilities of Husband.

113. The husband enjoying courtesy is liable in the interest of the wife's real and personal debts to the extent of the rents, but has relief against her other property, which may be primarily liable.[8] If cause be shown for fearing that he will deteriorate the subjects, he may be required to find caution, like other liferenters, under the Acts 1491, c. 25, and 1535, c. 15.[9]

Section 7.—Powers of Husband.

114. The husband has the powers of an ordinary liferenter.

Section 8.—Redemption.

115. Provision has been made by the 1924 Act[10] for the redemption of the right of courtesy by the proprietor of any land subject to that

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[1] Stair, ii. 6, 19; Ersk. ii. 9, 52; Fraser, H. & W. ii. 1124.
[2] *Primrose* v. *Crawford*, 1771, Hailes, i. 458; Bell, Com., 7th ed., i. 681.
[3] *M'Aulay* v. *Watson*, 1636, Mor. 3112; Ersk. ii. 9, 55; Bell's Prin., s. 1608.
[4] *Innerwick*, 1589, Mor. 329.
[5] Fraser, H. & W. ii. 1127; Craig, ii. 22, 44.
[6] More's Lectures, i. 74.
[7] 33 Vict. c. 14.
[8] *Monteith* v. *Her Nearest of Kin*, 1717, Mor. 3117; Fraser, H. & W. ii. 1126.
[9] See Ersk. ii. 9, 59; *Ralston* v. *Leitch*, 1803, Hume, 293; *Rogers* v. *Scott*, 1867, 5 M. 1078.
[10] 14 & 15 Geo. V. c. 27, s. 21 (3).

right or by any person holding a security over such land postponed to the right of the widower. The procedure is by action, in the Court of Session, or in the Sheriff Court of the county in which the whole or the greater portion of the lands are situated, to determine the annual amount of the right and the capital sum to be paid in redemption thereof. The redemption price is the sum required to purchase (*a*) from a British insurance company of long standing, to be named by the Court, an annuity on the widower's life equal to the annual amount of the courtesy; or (*b*) a Post Office Savings Bank annuity of the like amount, as the Court in its discretion may determine. On consignation of the redemption price the Court declares the lands to be disburdened of the right of courtesy. The result of the Court's inquiry may be to find that the average annual charges exceed the average free rental and that the right of the widower is valueless, and in such case the Court may declare that there are no free rents or profits of the land, and may declare the lands to be disburdened of the right.

CRABS AND LOBSTERS.

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PART I.—GENERAL.

SECTION 1.—DEFINITIONS.

116. Crime has been defined as any act or omission in violation of those duties which an individual owes to the community, and for breach of which the law has provided that the offender shall make satisfaction to the public; besides repairing, where that is possible, the injury done to the individual.[1] To a definition so wide, objection may be taken on the ground that it includes contraventions of enactments, sometimes of a temporary character, which impose the duty and provide a penalty for breach, and to which in many cases it is inappropriate to apply a term which usually connotes an offence of some gravity. To such contraventions certain of the general principles or rules of criminal law dealt with in this part of the article are not invariably applicable.[2] In judicial opinions offences are not infrequently referred to as distinct from crimes,[3] but no clear indication is given as to what constitutes the distinction.

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[1] Bell's Dict., *voce* "Crime"; Russell on Crimes and Misdemeanours, 8th ed., p. 1; Stephen, General View of the Criminal Law of England, p. 1.

[2] *O'Brien* v. *Macgregor*, 1903, 5 F (J.) 74; 4 Adam 202; *Anderson* v. *Rose*, 1919, J.C. 20; *Howman* v. *Russell*, 1923, J.C. 32; *M'Laren* v. *Smith*, 1923, J.C. 91 (ignorance of fact); *Hemphill* v. *Smith*, 1923, J.C. 23; *M'Kenna* v. *Sim*, 1916 S.C. (J.) 24; 7 Adam 732; *Greig* v. *Macleod*, 1908 S.C. (J.) 14; 5 Adam 445 (vicarious responsibility).

[3] *E.g.* Lord Justice-General Dunedin in *Rintoul* v. *Scottish Insurance Commrs.*, 1913 S.C. (J.) 120; 7 Adam 210; *Caledonian Rly. Co.* v. *M'Gregor*, 1909 S.C. 1010; *Strathern* v. *Padden*, 1926, J.C. 9.

Statutory definitions afford little guidance. In the Summary Jurisdiction (Scotland) Act, 1908,[1] offence is defined as "an act or attempt or omission punishable by law," and includes violation of the common law as well as breaches of statutory enactment. In other statutes, *e.g.* the Prevention of Crime Act, 1871, the terms "crime" and "offence" are not used in their ordinary sense, but have special meanings attached to them by definition clauses.[2]

117. In his treatise on the Criminal Law of Scotland,[3] Macdonald treats as crimes those offences only for the suppression of which the judge has power to pronounce sentence of death or deprivation of liberty, without the option of a pecuniary penalty. The division, however, is recognised by the author, for reasons which he gives, as unsatisfactory. Stephen,[4] in dealing with his definition of crime, distinguishes between acts involving punishment and those for which a "penalty" is provided. Where, in respect of any breach of the law, a party is liable merely to a penalty, recoverable at the option of some private prosecutor or common informer, he holds that such a breach of the law does not amount to a crime, thus excluding from this term contraventions of the numerous regulations in Municipal and Police Acts. This view is based on much the same principles as those recognised by the Courts in Scotland in cases in which the question whether the offences were civil or criminal arose with reference to the proper Court of review, and the following elements were referred to as shewing that the acts complained of were not criminal: (1) That the acts were not *mala in se*, *i.e.* offences contrary to the law of nature or the rules of morality, but *mala prohibita*, *i.e.* acts regarded as offences merely because prohibited by statutory enactment; (2) That the offences were not prosecuted by or with the concurrence of the public prosecutor; (3) That the prosecution was merely for recovery of penalties.

118. Acts or omissions punishable by law may be described as crimes, delicts, or contraventions according to their gravity, but it is probably impossible to make any division which avoids overlapping or is perfectly satisfactory. There is a difficulty in making "penalty" the test, in respect that certain statutes, while prescribing a penalty merely for an act done or omitted for the first time, authorise imprisonment for a repetition of the contravention.[5] Even if the contravention be not a crime, it is a fallacy to regard the fine or penalty attached to an act forbidden by statute as merely the price at which liberty to commit the prohibited act may be purchased.

119. The terms "felony" and "misdemeanour," which in English law mark the distinction between crimes of a higher and lower kind, are rarely used in Scots law. The terms appear in statutes made applic-

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[1] 8 Edw. VII. c. 65.

[2] 34 & 35 Vict. c. 112. *Murray* v. *Macmillan*, 1927, S.L.T. 106; *Strathern* v. *Padden*, 1926, J.C. 9.

[3] 3rd ed., p. 1.

[4] General View of the Criminal Law of England, pp. 2, 3.

[5] *E.g.* Motor Car Act, 3 Edw. VII. c. 36.

able to Scotland. By the Interpretation Act, 1889,[1] it is provided that in that and subsequent statutes "the expression 'felony' shall as respects Scotland mean a high crime and offence," and "the expression 'misdemeanour' shall as respects Scotland mean an offence."

120. According to the ancient practice of Scotland the crimes of murder, robbery, rape, and wilful fire-raising, because of their importance and the serious punishment with which they were followed, were treated as being in a special class and were cognisable only by the Justiciar and his deputes. From this they received the name of the four Pleas of the Crown. When the Court of Justiciary was established the Lords of Justiciary exercised a privative jurisdiction in these crimes until the passing of the Criminal Procedure Act, 1887.[2] To this privative jurisdiction, however, there was an exception in the case of murder where the murderer was taken red-hand or immediately after the fact. In such circumstances the Sheriff might try the case provided sentence was pronounced within twenty-four hours of the commission of the crime. The period of twenty-four hours was subsequently extended to three days. Though the term Pleas of the Crown is still retained, the question of jurisdiction is now regulated by the Criminal Procedure Act [2] and the Summary Jurisdiction (Scotland) Act, 1908.[3]

121. In Scotland, as in other countries, the law relating to crime is found to consist mainly of what is now known as the common law, or, in other words, the gradual growth of legal ideas and maxims applicable to crime evolved with the progress of society. In addition, there is the statute law, supplementing, and in some cases modifying, the common law; and further, the High Court of Justiciary possesses the valuable power, independent of statutory enactment, of taking cognisance of fresh phases of crime, even if these have hitherto been unknown to the law of Scotland.[4]

Section 2.—Essentials of a Criminal Act.

Subsection (1).—*The Act must be Voluntary.*

122. If a party is compelled by force to commit a crime, it is not his crime, but the crime of the party who compels him. The compulsion may be either by actual physical force, or, in certain cases, by threats of death or serious injury. The amount of compulsion necessary will vary according to the relation of the parties and the circumstances of each case, but it must be such as completely to overpower the will or prevent the possibility of independent action. If A. by force takes the arm of B., in which is a weapon, and therewith kills C., A. is guilty of murder, B. is not; but if the force put upon B. in order to compel him to kill C. consists of threats against his person or even against his life, B., apart from special

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[1] 52 & 53 Vict. c. 63. [2] 50 & 51 Vict. c. 35, s. 56. [3] 8 Edw. VII. c. 65, s. 8.

[4] Hume, i. 12; Macdonald, p. 252; Alison, i. 624. Cases of *Bernard Greenhuff, and Others*, 1838, 2 Swin. 236; *Will. Fraser*, 1847, Ark. 280 and 329; *Sweenie*, 1858, 3 Irv. 109, and 31 Sc. Jur. 24; see also *Strathern* v. *Seaforth*, 1926, J.C. 100; 1926, S.L.T. 445.

circumstances, has no legal excuse.[1] Influence short of compulsion, while it may be a ground for mitigation of punishment, is not a ground for acquittal. The question has not yet been raised in Scotland as to whether a person committing a crime while in a state of hypnotic subjection to another, would be free from punishment. If the subject was so completely under the power of the hypnotist as to lose all independent power of will, it would be difficult to distinguish such a case from one where physical force is the compelling power.

123. The compulsion of want is not recognised by the law of Scotland, except as a ground for mitigation of punishment. Hume [2] is of opinion that the old law of Burthynsack or Burdinseck—by which a man (presumably in necessitous circumstances) was not to be punished for the theft of a calf or a ram, or as much meat as he could carry on his back—did not exempt the thief from punishment, but only meant that for such a theft the offender should not be answerable with his life. The plea of necessity was set up in England in a case where two shipwrecked sailors had, in stress of hunger and in the reasonable belief that it was the only course open to them to preserve their lives, killed and eaten a companion; but the defence was not sustained, and it was held that such an action was, in law, wilful murder.[3] Sentence of death was pronounced in this case, but was afterwards commuted to imprisonment for six months.

Subsection (2).—*The Act must contain the Element of Dole.*

124. It is also of the essence of crime that the act must be "dolous." Hence arise the rules *crimen dolo contrahitur* and *actus non facit reum, nisi mens sit rea.* The term "dole" has been defined as "corrupt, malicious, or evil intention," but like the English "malice" it is an elastic term, and may vary from the most pronounced malice aforethought to culpable neglect in the performance of duty. In the latter case the dole is rather of a passive than an active nature—the want of due attention, the omission to take sufficient care to do right. The modifying words used in the old form of indictment to express the element of dole and which are now implied, when necessary to the charge, were "wilfully," "maliciously," "wickedly and feloniously," "falsely and fraudulently," "culpably and recklessly," "negligently," or "in breach of duty." Motive must not be confounded with dole. Motive may afford the key to the evil intention, but this intention may originate from a number of motives, or from a motive or motives which it is impossible to discover, and proof of motive is not essential to the conviction of crime in Scotland.[4] But, where the deed is a crime in itself or is an attempt to

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[1] Hume, i. 47–53; Alison, i. 668–675; Macdonald, pp. 13 and 15; Russell on Crimes and Misdemeanours, i. 93.

[2] i. 55.

[3] *The Queen* v. *Dudley and Stephens*, 1884, 14 Q.B.D. 273; Russell, *supra*.

[4] Hume, i. 25, 254; Macdonald, pp. 1, 2; Stephen, General View of the Criminal Law of England, pp. 70, 71; Harris, Principles of the Criminal Law of England, pp. 13, 14.

commit crime, the intent is presumed. Where a sane person does what is criminal the presumption is that he acted wilfully.

125. "A man is presumed to intend the natural consequences of his acts." [1] It is not necessary, however, that the particular result contemplated by the criminal should follow his act. Though the act done be not that which was intended the perpetrator may still be guilty of acting criminally. If A. puts poison in a drink for B., and C. drinks it and dies, A. is guilty of murdering C.; or if A. violently assaults B. for the purpose of robbing him, or to do him some grievous harm, but has no intention of killing him, and B. dies, A. is guilty of murder. In the case of criminal abortion, where there is no intention or desire to kill or injure the woman, if the use of instruments to bring about a criminal abortion results in the death of the woman the person using the instruments is guilty of murder.[2] Although in the general case intention is presumed, yet, where the existence of a particular definite intention is part of the essence of the crime, it must be alleged and proved, as, for example, "housebreaking with intent to steal."

126. Intention alone is not criminal, but attempt to commit a crime is now itself a crime.[3] Prior to the Criminal Procedure Act of 1887, the law took cognisance of attempts to commit crime only in the case of crimes of a specially serious or flagitious character. "The vicious will is not sufficient unless it is coupled to a wrongful act." [4] Remote preparations, however, do not amount to an attempt. There must be some overt act towards carrying out the evil intention. Matters must be carried beyond the stage of preparation and enter the stage of perpetration.[5]

127. Ignorance of the law is not a defence to crime, but error in fact may eliminate the element of dole, as where a man takes property in the *bona fide* belief that it is his own. In incest the relationship must have been known to the parties or to the party charged with the crime, but this will be presumed in the absence of counter-proof.[6] Reasonable ground for belief that the spouse of the first marriage is dead has been held to be a good defence to a charge of bigamy.[7] It is thought, however, that ignorance that a girl was under the age of 12 years would not be a good defence to a charge of rape. The provision of s. 5 of the Criminal Law Amendment Act, 1885,[8] to the effect that reasonable cause to believe that a girl was of or above the age of 16 years should

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[1] Stephen, General View, p. 72.

[2] *H.M. Adv.* v. *Fraser and Rollins,* 1920, J.C. 60; *H.M. Adv.* v. *Campbell,* 1921, J.C. 1.

[3] Criminal Procedure Act, 1887, s. 61; Summary Jurisdiction (Scotland) Act, 1908, s. 5, Sched. B.

[4] Hume, i. 26.

[5] Hume, *supra; H.M. Adv.* v. *Camerons,* 1911 S.C. (J.) 110; 6 Adam 456; *H.M. Adv.* v. *Mackenzie,* 1913 S.C. (J.) 107; 7 Adam 189.

[6] Hume, i. 452; Alison, i. 565; Macdonald, p. 202.

[7] Hume, i. 461; Alison, i. 539; Macdonald, p. 201; *Norman Macdonald,* 1842, 1 Broun 238.

[8] 48 & 49 Vict. c. 69.

be a sufficient defence to a charge under subs. 1 of that section has been repealed expressly by s. 2 of the Criminal Law Amendment Act, 1922,[1] except where the person accused is twenty-three years of age or under.[2] The maxims *crimen dolo contrahitur* and *actus non facit reum, nisi mens sit rea* must be read and applied with caution in cases of breaches of statutory enactment. Where anything is positively forbidden by statute, the commission of that thing, even ignorantly, may in some cases infer punishment or penalty without the existence of any corrupt purpose or intention to violate law.[3]

Section 3.—Persons not Legally Responsible for Crime.

128. It is a general rule that every person, whether a British subject or a foreigner, is answerable for offences against the laws of Scotland, committed within the jurisdiction of the Scottish Courts. To this rule, however, there are two exceptions, based upon (i) non-age, and (ii) alienation of reason.

Subsection (1).—*Non-age.*

129. Children under seven years of age are held to be incapable of crime, and are not liable to punishment as criminals.[4] Children above that age may be prosecuted and punished. Children above the age of puberty, which Hume [5] and Alison [6] regard as fourteen years in the case of females as well as males, were at one time liable to any punishment, death not excepted, for grave offences. In modern times, however, the tendency in regard to juvenile offenders is to avoid even sentences of imprisonment, and to look to their reformation rather than their punishment. In the Children Act, 1908,[7] elaborate provision is made for the treatment of "children," *i.e.* persons under the age of fourteen, and "young persons," *i.e.* persons between the ages of fourteen and sixteen. Section 102 of that Act provides that no child shall be sent to prison or penal servitude, that no young person shall be sent to penal servitude, and that a young person shall not be sent to prison unless the Court certifies that he is of such an unruly character that he cannot be detained in a special place of detention for which provision is made in the Act. Further, s. 103 of the Act abolishes the death sentence in the case of persons under the age of sixteen.

In England a child above seven and under fourteen years of age is presumed to be incapable of criminal intent (*doli incapax*), but the presumption, which weakens as the child's years advance towards fourteen, may be displaced by evidence of criminal capacity (*malitia*).[8]

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[1] 12 & 13 Geo. V. c. 56.

[2] See also Hume, i. 21–30; Macdonald, pp. 1, 2; Stephen, General View, p. 71; Harris, Principles, pp. 13–15; Russell on Crimes, i. 104.

[3] See cases in note 2, p. 51.

[4] Hume, i. 35; Alison, i. 666; Macdonald, p. 10.

[5] Hume, i. 31.

[6] Alison, i. 665.

[7] 8 Edw. VII. c. 67.

[8] Russell on Crimes, i. 59.

SUBSECTION (2).—*Alienation of Reason.*

130. Insanity forms a good ground of defence to a criminal charge and may be stated either as a plea in bar of trial or as a special ground for acquittal.

(i) *Insanity in Bar of Trial.*

131. If the accused is insane at the time of trial no verdict upon the charge made against him can be given. The question of the accused's mental condition and his capacity to plead may be raised by his advisers in a plea in bar of trial, by the Lord Advocate or those representing him as prosecutor, or by the Court *ex proprio motu*. In general the question is determined by a preliminary inquiry before a judge without a jury, before the accused is called upon or allowed to plead. It is, however, competent to allow the accused to plead and to proceed with the trial of the charge, leaving it to the jury to determine the question of the accused's sanity before they proceed to consider whether he committed the acts charged against him.[1] In *H.M. Advocate* v. *Brown* the class of insanity in such cases was described by the Lord Justice-General (Lord Dunedin) as "insanity which prevents a man from doing what a truly sane man would do, and is entitled to do—maintain in sober sanity his plea of innocence, and instruct those who defend him as a truly sane man would do," and the following direction was given to the jury: "It is a duty imposed upon you by the Act of Parliament to say whether in your judgment he (the prisoner) is in the condition of a truly sane man, who can not only tell his counsel how to defend him, but can tell his counsel, with the certainty of not being deceived, what he was really doing at the time during which the act is said to have been committed. If you come to the conclusion that the ravages of the disease are such that it cannot be said that this man is in the same condition as a sane man would be in, and that he is not able to tell fully about his actions, then you are bound to state that he is insane and not proceed to the other portion of the case."

(ii) *Insanity at the Time the Act was Committed.*

132. A prisoner insane at the time when he committed the act charged against him as a crime is entitled to a verdict of acquittal on the ground of insanity.[2] It has frequently been laid down as matter of law that to establish this ground of defence it must be proved that, at the time of the commission of the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know that he was doing wrong.[3] Lord Justice-Clerk Moncreiff,

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[1] 20 & 21 Vict. c. 71, s. 87; *H.M. Adv.* v. *Robertson*, 1891, 3 White 6; *H.M. Adv.* v. *Brown*, 1907 S.C. (J.) 67; 5 Adam 312.

[2] 20 & 21 Vict. c. 71, s. 88.

[3] Hume, i. 37; Alison, i. 645; Macdonald, p. 11; *Gibson*, 1844, 2 Broun 332, adopting the opinion of the consulted judges in *M'Naghten*, 1843, 4 St. Tr. (N.S.) 847; 10 Cl. & F. 200; 8 E.R. 718; *Brown*, 1866, 5 Irv. 215; *Dingwall*, 1867, 5 Irv. 466.

on the other hand, repeatedly expressed the view that the question could not be solved by any general test or definition and that the accused's insanity and consequent irresponsibility was to be judged of by the jury, as a question of fact, by the ordinary rules applicable to ordinary life, with the aid of any medical opinions given in evidence and such directions as the presiding judge might think necessary in the particular circumstances of each case.[1] Lord Justice-Clerk Moncreiff criticised in particular the test of ability to appreciate the distinction between moral or legal right and moral or legal wrong as inadequate and imperfect. "If a man have not a sane mind to apply his knowledge, the mere intellectual apprehension of an injunction or prohibition may stimulate his mind to do an act simply because it is forbidden, or not to do it because it is enjoined."[2] If alienation of reason exists, it is of no consequence whether it be chronic or temporary or though the cause may have been the accused's own acts of excess.[3]

133. Where alienation of reason is the ground of defence to a criminal charge, the usual plea is that at the time of the act charged the accused was insane and not responsible for his actions. In a recent case,[4] however, in which the driver of a motor car was charged with causing the death of a pedestrian by his reckless driving, *i.e.* a charge of culpable homicide, a special defence was stated for the accused that he was not guilty, "in respect that by the incidence of temporary mental dissociation due to toxic exhaustive factors he was unaware of the presence of the deceased on the highway and of his injuries and death, and was incapable of appreciating his immediately previous and subsequent actions." The jury returned a verdict in the following terms:— "The jury unanimously find that the panel at the time libelled was suffering from abnormality, and was therefore not culpable, and therefore not guilty." The presiding judge (Lord Murray) directed that the verdict should be entered as a general verdict in favour of the accused, and discharged him from the bar. The following points in the case may be noted:—

1. The charge was one of culpable negligence in the performance of a lawful act, not of doing an act in itself unlawful;

2. The defence was stated as a special defence and it was conceded that the onus of proof lay upon the accused;

3. In his charge to the jury the presiding judge adopted as the test of irresponsibility the test laid down in cases in which the defence was based on insanity, viz. "that, owing to some disordered condition of the mind which affects its working, the afflicted person does not know the nature of his act, or, if he does know what he is doing, he does not know that what he is doing is wrong;"

4. The jury having acquitted the accused on account of mental

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[1] *H.M. Adv.* v. *Macklin*, 1876, 3 Coup. 257; *H.M. Adv.* v. *Barr*, 1876, 3 Coup. 261; *H.M. Adv.* v. *Miller*, 1871, 3 Coup. 16. [2] *H.M. Adv.* v. *Miller*, *supra*.

[3] Macdonald, p. 12; *H.M. Adv.* v. *M'Donald*, 1890, 2 White 517.

[4] *H.M. Adv.* v. *Ritchie*, 1926, J.C. 45.

abnormality sufficient to exclude culpability, *i.e.* responsibility, no order such as is invariably pronounced where the jury acquit on the ground of insanity was made, nor, so far as the report of the case bears, did the accused come under any obligation relative to the driving of a motor car.

(iii) *Want of Consciousness.*

134. An act committed by a person who is asleep at the time is not criminal, there being no consciousness.[1] In the case referred to the accused having given an undertaking that no one but himself would in future sleep in the room which he might occupy, an undertaking which Crown counsel considered satisfactory, was dismissed from the bar.

Section 4.—Weakness of Mind as affecting Degree of Guilt and Punishment.

135. The doctrine appears to be now established in the law of Scotland that a prisoner, though not insane to the extent of being irresponsible, may suffer from such a degree of mental unsoundness as reduces the quality of his act from a graver to a less grave category of crime, *e.g.* from murder to culpable homicide. The mind of the accused at the time of the commission of the act charged may be so affected that his responsibility is diminished from full responsibility to partial responsibility.[2] In addition, weakness of mind or mental abnormality is frequently founded on successfully as a ground for mitigation of punishment. In capital cases recommendations to mercy made by juries on this ground have repeatedly led to prisoners being reprieved. In other cases recommendations by the jury to the leniency of the Court, or the appeals by counsel on behalf of the accused, have led the Court to pronounce sentences much less severe than would have been pronounced if the accused had been of normal mental capacity.

136. Special provision is made by the Mental Deficiency Act[3] in regard to the treatment of mental defectives, within the classes defined in the Act, charged with any offence punishable in the case of an adult with penal servitude or imprisonment. It has been held that mental deficiency does not in any way found a plea in bar of trial, and also that it does not provide a defence of irresponsibility as insanity does. If the fact of mental deficiency be established at the trial of the accused, "he may obtain the adoption of a lenient course of procedure (with a view to adoption of remedial treatment), which may or may not result in avoiding conviction and sentence for the offence charged."[4]

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[1] Macdonald, p. 13; *H.M. Adv.* v. *Simon Fraser*, 1878, 4 Coup. 70.

[2] Macdonald, pp. 15, 16; *H.M. Adv.* v. *Savage*, 1923 S.C. 49, and cases there cited; *H.M. Adv.* v. *M'Lean*, 1876, 3 Coup. 334; *H.M. Adv.* v. *Ferguson*, 1881, 4 Coup. 552, 9 R. (J.) 9. See *contra*, *H.M. Adv.* v. *Higgins*, 1914 S.C. (J.) 1; 7 Adam 229 (charge by Lord Johnston).

[3] Mental Deficiency and Lunacy (Scotland) Act, 3 & 4 Geo. V. c. 38.

[4] *H.M. Adv.* v. *Breen*, 1921, J.C. 30 (Lord Justice-General Clyde). See also *H.M. Adv.* v. *Gordon*, 1921, J.C. 67.

Section 5.—Drunkenness in Relation to Criminal Responsibility.

137. It may be stated as a general proposition that in law voluntary drunkenness affords no excuse for criminal misconduct. At one time, indeed, drunkenness was regarded rather as an aggravation than as a defence.[1] The general proposition is founded upon the principle that a man, who by his voluntary act weakens or destroys his will-power, should be in no better situation in regard to criminal acts than one who is sober. For a long period the rule was rigidly applied, but this rigidity was gradually relaxed as the view gained ground that in judging of a man's responsibility his actual mental condition, not the causes of that condition, was the real matter for consideration. Hume [2] questions the soundness of verdicts given in certain trials which took place early in the nineteenth century, and in which the accused were acquitted on the ground of insanity, though their mental condition at the time of the commission of the act was largely the result of alcoholic excess, and he suggests that the proper course would have been to convict and to recommend to the royal mercy. It is, however, now settled that when insanity exists to such a degree as to make the accused irresponsible, the fact that the insanity has its origin in alcoholic excess is not material. Further, when in the latter half of last century recognition was given to the doctrine that mental unsoundness short of insanity warrants a verdict of culpable homicide instead of murder, those cases in which the mental unsoundness was the result of or associated with excessive indulgence in liquor were not treated as exceptions,[3] though in such cases care was taken to direct the jury that drunkenness in itself was not an answer to the full charge.

138. Within the last few years the question of intoxication in relation to crime has been considered in this country and in England. In England the question was raised in the case of *The Director of Public Prosecutions* v. *Beard*,[4] and was considered by eight judges in the House of Lords. In that case the accused ravished a girl of thirteen years of age, and in furtherance of the act of rape placed his hand upon her mouth to stop her from screaming, at the same time pressing his thumb upon her throat with the result that she died of suffocation. The accused pleaded drunkenness as a defence and contended that the crime ought to be reduced from murder to manslaughter, on the ground that at the time when the crime was committed he had no intention of causing the girl's death, and that his mind was so affected by drink that he was incapable of knowing that in placing his hand over the girl's mouth and pressing her throat he was likely to inflict serious injury. The particular question in dispute was whether a direction given in the previous case of *R.* v. *Meade*,[5] to the effect that a person charged with a crime of

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[1] Hume, i. 45; Alison, i. 661.
[2] i. 40–41.
[3] E.g. *H.M. Adv.* v. *Dingwall*, 1867, 5 Irv. 466; *H.M. Adv.* v. *Granger*, 1878, 4 Coup. 86.
[4] [1920] A.C. 479; 14 Cr. App. R. 159.
[5] [1909] 1 K.B. 895.

violence resulting in death or serious injury may show, in order to rebut the presumption that he intended the natural consequences of his acts, that he was so drunk that he was incapable of knowing that what he was doing was dangerous, was a rule of general application, or was limited to the class of case with which the Court was then dealing. (In *Meade's* case the charge was murder, the basis of the charge being that the accused used violence, with a broomstick and his fist, towards the deceased with the intent of inflicting serious bodily harm.) The House of Lords held that the rule in *R.* v. *Meade* was not a rule of general application, and that in the circumstances of *Beard's* case drunkenness was no defence, unless it could be established that the accused at the time of committing rape was so drunk that he was incapable of forming the intent to commit the act of rape.

139. In the judgment delivered by the Lord Chancellor (Lord Birkenhead), in which the other Lords concurred, the following conclusions were drawn from earlier cases decided in the English Courts:—

1. That insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged;

2. That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved, in order to determine whether or not he had this intent;

3. That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

140. The law laid down in *Beard's* case was held applicable in Scotland by the Lord Justice-Clerk (Scott Dickson) in the case of *H.M. Advocate* v. *Campbell*,[1] a case which in its facts closely resembled the case of *R.* v. *Meade* in England. In *Campbell's* case the accused was charged with the murder of his wife, and it was proved that the wife's death was caused by violent blows inflicted upon her by the accused with his fists while he was in a state of intoxication. There was no plea that the accused was insane, but in defence it was contended that his intoxicated condition at the time of the assault was such as to reduce the crime from murder to culpable homicide. In his charge the Lord Justice-Clerk directed the jury that a verdict of culpable homicide would not be warranted, unless the jury were satisfied that the accused at the time of the assault upon his wife was in such a drunk condition that he had not the intention and could not form the intention of doing her serious injury.

141. The question of drunkenness as a defence was again raised in Scotland in the case of *H.M. Advocate* v. *Savage*.[2] In that case the accused was charged with murdering a woman by cutting her throat

[1] *H.M. Adv.* v. *Campbell*, 1921, J.C. 1. [2] *H.M. Adv.* v. *Savage*, 1923, J.C. 49.

with a razor. Insanity was pleaded in defence to the charge. At the trial evidence was given on behalf of the accused that at one time he had received an injury to his head, in consequence of which he had become eccentric, and also that the accused was in the habit of indulging to excess in alcohol and of drinking methylated spirits, which caused him to become violent and irresponsible. As an alternative to the plea of insanity it was maintained for the accused that, in consequence of excessive indulgence in alcohol, his mind at the time of the act charged was so defective as to reduce the crime from murder to culpable homicide. In dealing with this contention in his charge to the jury the Lord Justice-Clerk (Alness) did not expressly direct the jury to consider the question of the accused's capacity to form the intent to kill or to do serious injury to the deceased woman—as the weapon used was a razor it was scarcely arguable that only slight injury was contemplated—but he affirmed the doctrine of partial irresponsibility because of mental unsoundness, not amounting to insanity, which had been rejected by Lord Johnston in the case of *H.M. Advocate* v. *Higgins*,[1] and which finds no place in the law laid down in *Beard's* case in England.

Section 6.—Guilt of Crime by Accession.

142. Where an overt act in the perpetration of a crime has taken place, liability to punishment is incurred not only by the actual perpetrator but also by those who have aided in the contrivance or the execution of the crime. By statute [2] every person accused of a criminal offence, except treason or rebellion against the sovereign, is impliedly charged as guilty "actor or art and part," *i.e.* as principal or as accessary. In treason all are guilty as principals. In a charge of concealment of pregnancy contrary to the Act 49 Geo. II. c. 14, a person can only be accused and punished as "actor." In this case the nature of the offence is incompatible with the idea of accession and under the statute the punishment of imprisonment is imposed upon the mother alone.[3]

143. Guilt by accession may be incurred (1) by giving counsel or assistance to the principal prior to the crime or otherwise acting in previous concert with him in preparation or furtherance of the future act, or (2) by concert, assistance, or incitement at the time of perpetration of the criminal act. Where previous counsel or instigation alone is relied on as the foundation of guilt it must be serious, earnest, and pointed; words of mere permission or approbation or expressions of enmity against the person upon whom injury is inflicted or attempted are not enough.[4] The counsel must relate also to some special attempt or immediate course of action, and must reasonably tend to such a criminal act as is committed.

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[1] 1914 S.C. (J.) 1; 7 Adam 229.
[2] 50 & 51 Vict. c. 35, s. 7; 8 Edw. VII. c. 65, s. 5, Sched. B.
[3] Macdonald, p. 150; Hume, i. 299; Alison, i. 158.
[4] Hume, i. 278; Ersk. Inst. iv. 4, 11.

144. The instigator is liable, though the person instigated procure another to execute the act and also although by mistake some person other than the person contemplated by the instigator is injured. Where, however, the person instigated, to gratify his own enmity, wilfully commits the criminal act upon such other person, the link between the counsel and the act committed is wanting, and the instigator is free. The instigator is also liable for those consequences which are the not unlikely result of the act counselled. Thus the instigator of a crime involving violence such as robbery or rape is guilty of murder, if as a result of the violence used the victim dies.[1]

145. Guilt is also inferred from material assistance knowingly given in the preparation for, or in furtherance of, the crime subsequently perpetrated or attempted. If A. furnish B. with poison knowing that B. intends to administer it unlawfully to C., and B. administers it or attempts to administer it to C., A. is guilty. Similarly, the person who provides a weapon that it may be unlawfully used in injuring another is guilty of the violence committed upon that other. The assistance, however, must be given in contemplation of the particular crime committed. He who supplies housebreaking tools to a known thief does not thereby render himself guilty of the acts of housebreaking committed by the thief. But, if the tools are supplied for the purpose of particular premises being broken into, or even in the knowledge that the thief intends at that time to break into particular premises, it is thought that the person supplying the tools is guilty as accessary if the thief does break into or attempts to break into these premises.[2]

146. The connection between the instigation or the assistance given prior to the criminal act and the act itself must continue to the last. The instigator is not guilty if he repent and endeavour to dissuade the person instigated. The person who has given aid is not guilty, if in the knowledge of the perpetrator he has withdrawn from and repudiates the plot. The retractation, however, must be made seriously and in good faith, and must be given timeously. It is stated in Hume and Macdonald that the accessary remains liable if owing to accident his retractation does not reach the principal in time.[3]

147. The guilt of the accessary is guilt of the crime committed, and accordingly, if the criminal act be perpetrated in Scotland, the accessary is subject to the jurisdiction of the Scottish Criminal Courts, though the part taken by him in instigating or in assisting may have taken place in another country.[4]

148. Guilt as accessary may also result from the accused's conduct at the time of the commission of the criminal act. Where the accused's presence at the locus and the part taken by him are the result of previous concert, he is guilty of all the acts done in execution of the common plot. Where a number conspire to lie in wait and to kill or to do serious injury

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[1] Hume, i. 280; Alison, i. 58, 59; Macdonald, p. 5.
[2] Hume, i. 274, 275; Macdonald, p. 6.
[3] Hume, i. 279, 280; Macdonald, p. 7.
[4] Macdonald, p. 7; *H.M. Adv.* v. *Duncan and Cumming*, 1850, J. Shaw 334.

to a certain person, it matters not who strikes the fatal blow. If death result all are guilty of murder. If thieves agree to commit theft by housebreaking the one whose part is to watch to prevent surprise is guilty, though he does not enter the building or handle the goods which are stolen.[1]

149. Guilt, however, may be established without evidence of previous concert. Combination or participation at the moment is sufficient. Exhortation or incitement to do an unlawful act given upon the spot, and assistance rendered at the moment which facilitates the perpetration of the crime, either by preventing interference with the perpetrator or by impeding or intimidating the person against whom the crime is committed, are decisive acts of participation. Except in special circumstances, mere non-interference by a person who is present when a crime is perpetrated does not render him guilty as accessary. A case has occurred in which a charge against a magistrate of refusing to assist a messenger against a rabble who were obstructing him in the execution of his duty was held relevant as a charge of deforcement.[2] In another case, however, where the only evidence against an accused, charged as art and part in the crime of assault with intent to ravish, was that he stood looking through a hedge while two companions successively assaulted a girl, Lord Ardmillan directed the jury that it would not be safe to convict, and a verdict of not proven was returned.[3]

150. Accession after the fact, though it may afford evidence from which, taken with the other evidence in the case, previous participation may be inferred, does not *per se* render a person guilty as art and part in the crime committed except in the case of treason. It is, however, an offence against the law to screen the guilty or to aid a criminal to escape.[4]

Section 7.—Aggravation of Crime.

Subsection (1).—*As affecting Tribunal and Punishment.*

151. In modern times wide discretionary powers are conferred upon judges in the matter of punishment of offenders convicted of crime, and, in order that the punishment in any particular case may be appropriate, consideration is given not merely to the criminal act committed but also to all circumstances which tend to aggravate or to palliate the guilt of the offender. Certain circumstances and conditions are now definitely recognised as aggravations of guilt. The tribunal by which an accused is to be tried depends largely upon whether or not one or other of these aggravations is libelled in the charge made, and proof of the aggravation determines in great measure the degree of punishment which will be inflicted for the offence. Under the Summary Jurisdiction (Scotland)

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[1] Hume, i. 102, 265; Alison, i. 60–62, 289–291; Macdonald, p. 8; *H.M. Adv.* v. *Camerons*, 1911 S.C. (J.) 110, at p. 112.

[2] Hume, i. 397, case of *Thomas Mitchell*, 1698; Alison, i. 506.

[3] *H.M. Adv.* v. *Kerr, Wilson, and Donald*, 1871, 2 Coup. 334.

[4] Hume, i. 282, 283, 533; Alison, i. 68, 616; *H.M. Adv.* v. *Camerons, supra.*

Act, 1908,[1] certain specified aggravations have the effect of excluding from the jurisdiction of Courts of summary criminal jurisdiction (other than the Sheriff Court) offences which, if unaggravated, might be competently tried in such Courts.

Subsection (2).—*Classes of Aggravation.*

152. Aggravations may arise (i) from special circumstances in or associated with the criminal act which is committed, or (ii) from circumstances independent of the particular act, viz. the character and habits of the accused, and in particular his criminal record prior to the commission of the offence charged.

(i) *Circumstances connected with the Criminal Act.*

153. In offences, whether against property or against the person, the aggravation may consist in the fact that the offence committed involves the breach of some special duty which the offender has undertaken or with which he has been entrusted. Thus it is an aggravation of theft if the thief be a person whose duty it is to protect property, *e.g.* a police officer on duty or the guardian of the stolen property.[2] It is, however, not customary now to charge as a specific aggravation of theft the fact that the thief was the servant, or the apprentice, of the owner of the goods, or was a carrier to whom the goods had been given for conveyance. Assault upon a child or infirm person by the person to whom the care and custody of the child or the care of the invalid has been committed, and assaults by officers of law upon prisoners under their charge are regarded as aggravated assaults.[3]

154. In both classes of offences also the aggravation may relate to the mode in which the offence is committed. Housebreaking, shipbreaking, and opening lockfast places are recognised as aggravations of the crime of theft.[4] Using or threatening to use firearms, cutting and stabbing, and throwing acids are aggravations of the crime of assault.[5] The crime of assault may also be aggravated by the intent of the delinquent, *e.g.* intent to kill or to do grievous bodily harm, intent to ravish or to gratify lewdness, intent to rob, intent to compel the execution of a deed, intent to intimidate employers or workmen in order to compel a rise in wages or to deter from working, etc.[6]

155. Where an assault has resulted in serious injury it is usual to charge as an aggravation the nature or extent of the injury inflicted, *e.g.* that the assault was to the danger of life, to serious injury of the person, to the fracture of bones, or with effusion of blood, or that the

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[1] 8 Edw. VII. c. 65, s. 8.
[2] *Ferrie and Banks*, 1831, Bell's Notes, 34; Macdonald, p. 50.
[3] Macdonald, pp. 155, 159, 160.
[4] Macdonald, p. 28; Hume, i. 98; Alison, i. 282.
[5] Macdonald, p. 157; Alison, i. 179.
[6] Macdonald, p. 156; Alison, i. 184–188; Hume, i. 328, 329.

assault resulted in the communication of venereal disease.[1] In such cases of grave assaults in which the seriousness of the crime lies in the degree of violence used by the delinquent and the extent of the injuries suffered by the person assaulted, it became, at an early stage, the practice to charge the delinquent with assault and to state the serious parts of the charge as aggravations of the simple crime. Alison refers to the practice and gives the reasons for its adoption. "In this way," he writes, "the facts which have really occurred are brought before the jury, while at the same time the inconvenience is avoided of the whole charge being endangered, if parts of the aggravations are not established. And it has become another beneficial consequence of this system, that the ancient statutes imposing heavy punishments upon particular kinds of violence have gone out of practice; and assaults of serious kinds are stated with aggravations in such a manner that it is in the power of the jury by finding part proven and part not proven to accommodate their verdict to the real delinquency of the case." [2]

156. Other aggravations of assault relate (*a*) to the place in which the assault is committed, as in the presence of the Sovereign, in a royal domain, in the Supreme Courts of Justice, (*b*) to the person assaulted, *e.g.* clergymen, judges, magistrates, and officers of law in reference to their official duty, or soldiers when acting in aid of the civil magistrate or in charge of a military prisoner, (*c*) to the natural tie which exists between the delinquent and the person injured, as assault by a child on his parent or by a husband on his wife.[3]

157. Aggravation of theft may also result from the nature of what is stolen. Theft of a child (*plagium*) has always been treated as a highly aggravated offence. Thefts of horses, cattle, and sheep were also charged as aggravated cases of the crime of theft, but it is doubtful if the aggravation would now be specially founded on.[4]

(ii) *Circumstances Independent of the Criminal Act.*

158. Among the aggravations of the second class are the aggravation, peculiar to the crime of theft, which results from the offender being habit and repute a thief,[5] *i.e.* one who notoriously gets his livelihood or supplements it by thieving. Doubtful reputation is not sufficient to establish this aggravation. The accused must have been marked as a common thief by the common bruit and report of the neighbourhood.[6] According to Hume, when the accused's character and way of life (*i.e.* as a common thief) have been duly established, the particular act of theft charged "comes to be considered as a confirmation only, and a detected instance of his daily course of evil-doing; and his punishment is justly proportioned to the habits and calling of the man as a trained

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[1] Macdonald, p. 158; Alison, i. 181.
[2] Alison, i. 181.
[3] Macdonald, p. 158; Alison, i. 193–197.
[4] Macdonald, p. 50; Alison, i. 280, 309.
[5] Macdonald, p. 46; Alison, 296; Hume, i. 92.
[6] Hume, i. 93; Alison, i. 297.

thief, and a common nuisance to the country." [1] The charge of being habit and repute a thief, however, is not a substantive charge, and even if it be established the accused cannot be punished therefor unless convicted upon the substantive charge of theft preferred against him.

159. It is always competent to charge previous convictions of a similar offence as aggravations. The conviction must be *ex facie* legal [2] and must be previous to the substantive offence with which the accused is charged. The aggravation consists in the act charged as a crime being committed by a person who has before been convicted of a crime of a similar nature. Prior to 1887 it was necessary that the previous conviction should be for the same crime, *e.g.* a previous conviction of theft in a charge of theft, or a previous conviction of reset in a charge of reset, but not a previous conviction of theft in a charge of reset, nor a previous conviction of reset in a charge of theft. The rules governing this aggravation were, however, altered by the Criminal Procedure Act of 1887.[3] Under the special provisions of that Act previous convictions of any crime inferring dishonesty may be lawfully charged and proved as aggravations of any subsequent crime inferring dishonesty ; [4] previous convictions of any crime inferring personal violence may be lawfully charged and proved as aggravations of any subsequent crime inferring personal violence,[5] and previous convictions of any crime inferring lewd, indecent, or libidinous conduct may be lawfully charged as aggravations of any subsequent crime of a lewd, indecent, or libidinous character.[6]

160. An extensive enumeration of crimes inferring dishonesty is given in s. 63 of the Act, viz. robbery, theft, stouthrief, reset, forgery and uttering forged documents, falsehood, fraud, and wilful imposition, housebreaking with intent to steal, assault with intent to rob, breach of trust and embezzlement, burglary, larceny, obtaining goods or money by false pretences, swindling, cardsharping, and attempts to commit any of these crimes; crimes contrary to the Acts of Parliament relating to the King's coinage, and crimes relating to the King's coinage at common law, and crimes inferring dishonest appropriation by post office officials and attempts to commit such crimes, whether under the Post Office Acts or at common law. The enumeration of particular crimes is followed by the general words "and all other crimes inferring dishonest appropriation of property by a person not the owner thereof, whether in contravention of any Act of Parliament or at common law." It is also provided as regards each of the three categories of crime that any aggravations set forth in the previous conviction or convictions may also be founded on as aggravations.

161. These provisions of the Criminal Procedure Act were made applicable to cases tried in Courts of summary jurisdiction by the Summary Jurisdiction (Scotland) Act, 1908.[7] In the latter Act it is

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[1] Hume, i. 92.
[2] Macdonald, p. 13; Alison, i. 304, 305; *Grant* v. *Allan*, 1889, 2 White 261; 16 R. (J.) 87.
[3] 50 & 51, Vict. c. 35. [4] *Ibid.*, s. 63. [5] *Ibid.*, s. 64.
[6] *Ibid.*, s. 65. [7] 8 Edw. VII. c. 65, s. 5, Sched. B.

further provided that "previous convictions of an offence under any statute or order may be libelled as aggravations in any subsequent charge for the same kind of offence or any analogous offence, and a conviction of any offence inferring dishonesty may be libelled as an aggravation of any offence inferring dishonest appropriation of property or attempt thereat, and a conviction of any offence inferring disorderly conduct or a breach of public order may be libelled as an aggravation of any other offence inferring disorderly conduct or a breach of public order.[1] This provision is made applicable to procedure under indictment.[2] The previous convictions which may be founded on are convictions obtained in any part of the United Kingdom.[3] By s. 2 and the Schedule of the Irish Free State (Consequential Adaptation of Enactments) Order, 1923,[4] made under the provisions of s. 6 of the Irish Free State (Consequential Provisions) Act, 1922 (Session 2),[5] it is provided that the expression "United Kingdom," where the expression first occurs in s. 18 of the Prevention of Crime Act, 1871,[6] shall be construed as including the Irish Free State.

PART II.—PARTICULAR CRIMES.

Section 1.—Crimes against the Deity and Religion.

Subsection (1).—*Blasphemy and Atheism.*

162. Blasphemy has been called the crime of treason against the Deity or *divine lese-majesty.*[7] It is a crime both at common law and by statute, and was formerly punishable by death as in both the Jewish and Roman laws.[8] Blasphemy [9] as a *nomen juris* was used to include both railings and cursings against the Deity and divine things, which is blasphemy in the narrower sense, and also the dispassionate denial of the existence of the Deity, which is termed atheism. The former was regarded as the more serious offence, one transgression constituting the crime, whereas in the case of atheism the denial of the existence of the Deity must be persisted in.

163. Blasphemy in the narrower sense is dealt with by the Act 1661, c. 21, which provides that "whosoever, hereafter, not being distracted in his wits, shall rail upon or curse God, or any of the persons of the blessed Trinity, shall be processed before the Chief Justice, and being found guilty, shall be punished with death." This Act was repealed by 53 Geo. III. c. 160, s. 3, and the crime fell to be dealt with at common law. In 1825, the Act 9 Geo. IV. c. 47 restricted the

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[1] 8 Edw. VII. c. 65, s. 34 (7).
[2] *Ibid.*, s. 77 (4).
[3] 33 & 34 Vict. c. 112, s. 18; 50 & 51 Vict. c. 35; 8 Edw. VII. c. 65.
[4] S.R. & O., 1923, p. 400.
[5] 13 Geo. V. c. 2.
[6] 33 & 34 Vict. c. 112.
[7] Ersk. Inst. iv. 4, 16.
[8] The only instance of capital judgment is the case of *Thomas Aikenhead*, 1696, Hume, i. 570; M'Laurin, pp. 12 and 731; Arnot, p. 324.
[9] Hume, i. 568 *et seq.*; Alison, i. 643; Macdonald, p. 209; Anderson, p. 92.

common law pains and enacted that the punishment was to be fine or imprisonment or both. A second offence might be punished with banishment, but this provision was repealed by 7 Will. IV. c. 5.

164. Blasphemy may be spoken or written. Spoken blasphemy has ceased to be prosecuted except as an aspect of disorderly conduct. The sale of blasphemous writings may be dealt with summarily [1] or on indictment.[2]

165. Atheism,[3] as above pointed out, is the persistent denial of the existence of the Deity. The Act 1621, c. 21, makes the obstinate denial of God, or of the persons of the blessed Trinity, a capital offence. The Act 1695, c. 77, extends the scope of the previous Act to any "denial or challenge" of the authority of the Holy Scriptures of the Old and New Testaments, or of the Providence of God in the government of the world. This Act also settled that an obstinate offender, and one therefore subject to the capital penalty, is one who shall be convicted for the third time. These statutes were both repealed by 53 Geo. III. c. 160, s. 3. The crime was therefore left to the common law and is now on the same footing as blasphemy.

Subsection (2).—*Profanity, Cursing, and Swearing.*[4]

166. Under our ancient law the use of profane language was a statutory offence. The Acts 1551, c. 16, and 1581, c. 103, enacted that a conviction on a charge of profane swearing should be followed by a sentence of imprisonment and setting in the jugs or stocks, or, in cases of great obstinacy, by banishment. By Acts of Chas. II. 1661, c. 19, and 1661, c. 38, it was provided that the punishment of cursing and swearing should be a fine, in proportion to the rank of the offender. One-half of this was to go to pious purposes within the parish, the other half to the informer and in payment of the costs of prosecution. If the offender could not pay, corporal punishment might be imposed. The Act 1661, c. 38, committed the execution of the statutes dealing with profanity to justices of the peace; and an Act of 1696, c. 31, empowered any person to prosecute. No prosecution would now be undertaken for the statutory crime of profanity. In modern criminal practice, profanity by cursing and swearing constitutes or helps to constitute disorderly conduct or a breach of the peace. It is dealt with summarily at common law or under Police Acts and is punished by fine or imprisonment.

Subsection (3).—*Sabbath-breaking.*

167. The due observance of the Sabbath has been enjoined by various Acts from 1503 down to 1701. These Acts contain prohibitions against holding fairs; buying and selling, working, gaming, or playing;

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[1] *Thomas Finlay*, 1843, 1 Broun 648, note.
[2] *Robinson*, 1843, 1 Broun 590, 643; *Paterson*, 1843, 1 Broun 629.
[3] Hume, i. 568.
[4] *Ibid.*, 572; Macdonald, p. 209; Anderson, p. 62.

resorting to ale-houses; salmon fishing; and so forth. Most of these Acts must now be regarded as in desuetude.[1] The only enactments which have come up for consideration within recent years are the Acts 1579, c. 70, 1661, c. 18, and 1696, c. 31. The Act 1579, c. 70, provides that "no hardy labouring, nor working, be used on the Sabbath day," and in the case of *Middleton* v. *Paterson*,[2] decided in 1904, Lord Justice-Clerk Macdonald and Lord Trayner expressed the view that it was not in desuetude, and that refusal to work on Sunday would not of itself involve a breach of the Salmon Fisheries Act, 1868. This decision must, however, be regarded as overruled by *Middleton* v. *Tough*, decided in 1908. The Acts 1661, c. 18, and 1696, c. 31, are also directed towards preventing desecration of the Sabbath, and particularly the keeping working of salt-pans, mills, kilns, and the keeping open of shops. On two occasions attempts to use these enactments to prevent shops being opened on Sunday have brought the statutes before the Courts. In 1870, in the case of *Bute*,[3] the statutes were said not to be in desuetude, and this view was followed in 1887 in the case of *Nicol*.[4] In both cases it was held that a summary complaint for a contravention of the Act was incompetent. It is therefore unlikely that any prosecutions will be brought under it. Sunday trading is usually dealt with under the Burgh Police Acts.[5]

168. Provisions against the disturbance of public worship are to be found in the Acts 1551, c. 17, and 1587, c. 27. By 10 Anne, c. 7, s. 9, persons disturbing congregations lawfully assembled for public worship are liable to a penalty of £100 sterling.[6]

Section 2.—Crimes against the State.

Subsection (1).—*Treason*.[7]

(i) *Definition of the Crime.*

169. By the ancient law of Scotland treason was either proper or constructive. Treason proper comprehended all offences which were held to be high treason itself—offences against the State or the Sovereign.[8] Constructive treason embraced all offences which, though in themselves bearing none of the characters of treason, were, from their serious nature, punished as treason.[9] In both these classes of treason the punishment

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[1] *Middleton* v. *Tough*, 1908 S.C. (J.) 32; *Smith* v. *William Beardmore & Co.*, 1922 S.C. 131.

[2] 1904, 6 F. (J.) 27; 4 Adam 321. [3] *Bute* v. *More*, 1870, 9 M. 180; 1 Coup. 495.

[4] *Nicol* v. *M'Neill*, 1887, 14 R. (J.) 47; 1 White 416.

[5] *Rossi* v. *Mags. of Edinburgh*, 1903, 5 F. 480; *Da Prato* v. *Mags. of Partick*, 1907 S.C. (H.L.) 5.

[6] *Dougall* v. *Dykes*, 1861, 34 Sc. Jur. 29; 4 Irv. 101.

[7] Hume, i. 512; Alison, i. 596; Ersk. iv. 4, 20; Stair, ii. 3, 66; Macdonald, p. 226; Anderson, p. 54.

[8] See 1424, cc. 3, 4; 1449, c. 25; 1455, c. 54; 1584, c. 129; 1661, c. 5; 1662, c. 2; 1689, cc. 1, 2; and 1703, cc. 1, 3.

[9] See 1528, c. 8; 1587, cc. 50, 51; 1592, c. 146; and 1681, c. 15.

was death, forfeiture of real and personal estate, and loss of honour and privilege. By the Act of 7 Anne, c. 21, ss. 1, 23, the English law [1] of treason was adopted as that of Scotland. The basis of the law of treason in England is 25 Edw. III. stat. 5, c. 2, which established the various modes of committing treason.

170. Under the statute of Edw. III. it is treason "to compass or imagine the death of the King, or of his Queen, or their eldest son and heir." [2] The word "King" means Sovereign reigning, whether ceremonially crowned or not, and applies to a King *de facto* as well as *de jure*. It applies to the heir of the King, though not yet crowned, from the moment of his predecessor's death. The term includes a queen regent, but not her consort. The words "his Queen" refer to the wife of the reigning Sovereign, so long only as the marriage lasts. The words "eldest son and heir" indicate only the eldest son of the Sovereign, and not the presumptive heir, nor eldest daughter where there is no son. If a usurper is in possession of the throne, the treason laws do not apply to acts of outward warfare done against the rightful heir to the Crown.[3]

171. The crime does not consist in a mere state of mind. There must be overt acts indicating treasonable intention. An overt act is "any act manifesting the criminal intention and tending towards the accomplishment of the criminal object." [4] Thus, lying in wait to kill the King, preparing arms or poison for this purpose, consulting as to means of doing so, bribing a person to do so, are direct overt acts. There may be dubiety as to whether writings or words spoken amount to overt acts. Speculative writings, unpublished, are not treasonable. Writings which relate to an existing treasonable conspiracy may, though unpublished, amount to a proper overt act.[5] A general impeachment of monarchy is not treasonable; but if published writings arraign the existing Sovereign as a tyrant, they are treasonable.

As regards words spoken, if the language used is general and not relative to any design, it is not treasonable.[6] Spoken words, however, may affix a treasonable character to an ambiguous act; and, conversely, the character of the act done may affix a treasonable signification to words spoken.

172. The law of treason is extended, as regards the person of the Sovereign, by the Act 36 Geo. III. c. 7, which is made perpetual by 57 Geo. III. c. 6. By this statute it is treason "to compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint, of the person of the Sovereign." In the case of the King's wife or heir, the compassing must be directed against their lives, and not merely aim at restraint of their persons.

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[1] Kenny, Outlines of Criminal Law, 12th ed., p. 267. [2] Hume, i. 520–1; Alison, i. 605–6.
[3] Hume, i. 520. [4] *R.* v. *Thistlewood*, 1820, 33 St. Tr. 684, per Lord Tenterden.
[5] Hume, i. 517, 518, and cases there.
[6] *R.* v. *Charnock*, 1696, 2 Salk. 631; *R.* v. *Despard*, 1803, 28 St. Tr. 346, at p. 487.

173. It is treason if a man violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir.[1] It matters not whether the carnal knowledge be by force or consent, and it is treason in the woman consenting as well as in the man.

174. It is treason to levy war against the King within his realm.[2] There must be a levying of war. A mere consultation or conspiracy to levy war is not enough. But the raising and assembling of a warlike force, or attack on the King's troops for public reasons, or holding out a castle against the King's troops, amounts to levying of war. It is not essential that the persons charged be in military array or be armed with military weapons.[3] The war must be levied against the King. It is enough that the royal prerogative or authority is attacked, or reformation of the established laws or political institutions is attempted by force. But a rising is treasonable only when it aims at the accomplishment of a general object, or takes cognisance of a matter of general concern. When tumult arises from a special provocation, or merely to redress a local grievance, this is riot only, and not treason. The levying of war must be within the King's realm. This includes the narrow seas, so that it is treasonable to attack a royal vessel there.

175. It is treasonable to adhere to the King's enemies, or aid or comfort them within the realm or elsewhere. The adherence need not be that of a person within the King's "realm."[4] The subjects of the King owe him an allegiance which everywhere follows the person of the subject.[5] If a British subject hands over to the enemy arms, fortresses, or ships of war, or communicates valuable intelligence to the enemy's forces, or marches with the enemy's forces, or takes service in an enemy's ship of war, or endeavours to persuade British soldiers to join the armed forces of the enemy, he is "adherent to the King's enemies." It is a jury question who shall be considered an "enemy." Every alien who comes into this country in open hostility is an enemy, though his State be at the time friendly with Great Britain. Acts of adherence to those opposed to the King's allies are treasonable.

176. It is treason to counterfeit the King's Great or Privy Seal, or the Crown Seals appointed by the Act of Union to be used in Scotland.[6]

177. It is treason to slay the King's chancellor, treasurer, or justices while in office.[6] This includes the slaying of any of the judges of the Scottish Supreme Courts while sitting in judgment.

178. It is treasonable [7] to endeavour, by any direct and overt act, to hinder the succession to the Crown of the person entitled to succeed according to the provisions of the Act of Settlement; and, by 6 Anne,

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[1] Hume, i. 521; Alison, i. 606; More, ii. 394. [2] Hume, *supra*; Alison, *supra*.
[3] Hume, i. 523, and cases there cited; *R.* v. *Dowling*, 1848, 7 St. Tr. (N.S.), 382, at p. 461.
[4] *R.* v. *Casement*, 1916, 12 Cr. App. Rep. 99; cf. *R.* v. *Lynch*, 1903, 20 Cox C.C. 468, at p. 477.
[5] *R.* v. *Casement*, *supra*, per Darling J. at p. 119.
[6] See 7 Anne, c. 21, s. 11. [7] 1 Anne, stat. 2, c. 17.

c. 7, it is treason to maintain and affirm, advisedly and directly, by writing or printing, that any person has right to the Crown of these realms, otherwise than by the Act of Settlement, or that the King and Parliament cannot make laws to bind the Crown and descent thereof. But to do the same by teaching, preaching, or advised speaking does not amount to treason.

179. The peculiar connection which existed between the doctrines of the Church of Rome and certain principles of political government led to the passing, shortly after the Reformation, of severe penal statutes against Roman Catholics. Various civil disabilities and penalties were imposed by those statutes, and some of them made the offences which they dealt with punishable as treason, *e.g.* the Act 13 Eliz. c. 2, Parl. 2 and 3. In virtue of 7 Anne, c. 21, such Acts apply to Scotland.

(ii) *Persons who are Amenable to Trial for Treason.*[1]

180. (1) Everyone born of a British father, whether resident at home or abroad.

(2) Every natural-born subject [2] of a friendly State who is resident in this country. If war breaks out between his State and Great Britain, he must leave this country before he is entitled to take service under his own prince. If he remains, he is treated as a British subject. Foreign ambassadors are guilty of treason when they attempt the Sovereign's life.

(3) An enemy coming to Great Britain under protection of a royal safe-conduct is amenable to the laws against treason.

(4) Accessories, whether before or after the fact, are principals in treason.

(iii) *Procedure.*

181. In Scotland treason may be tried by the Court of Justiciary or by any Royal Commission of Oyer and Terminer, containing at least three Lords of Justiciary. If the Lord Advocate desires it, any trial for treason pending before the Commission may, by a *certiorari* under the Great Seal, be transferred to the Justiciary Court. A grand jury of twelve must, within three years after the offence, find a true bill against the traitor, and the trial then proceeds before a petty jury of twelve. A copy of the indictment and list of the jury must be served on the prisoner, the *inducię* being fifteen days. The accused has right of peremptory challenge of jurors to the number of thirty-five. Two concurring witnesses to each overt act libelled, or one witness to each of two or more overt acts of the same species of treason, are required.[3] The Criminal Procedure Act, 1887, does not apply to treason, nor affect the procedure in any prosecution or trial therefor.[4]

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[1] Macdonald, p. 231.
[2] Kenny, *op. cit.*, p. 272.
[3] 1 Edw. VI. c. 12 ; 5 & 6 Edw. VI. c. 11 ; 1 & 2 Phil. and Mary, c. 10 ; 7 Will. III. c. 3.
[4] 50 & 51 Vict. c. 35, s. 75.

(iv) *Punishment.*

182. The punishment is (1) Death. The accused is to be drawn on a hurdle to the place of execution and hanged or beheaded (the latter only in the case of men).[1] After death the body is quartered.[2] (2) Confiscation of moveables. (3) Forfeiture of honours and heritage held in fee-simple to the Crown. (4) Corruption of blood, no one succeeding to the traitor as heir, or through him.[3] In England the punishment of treason is now hanging, the consequences of forfeiture and attainder having been abolished by 33 & 34 Vict. c. 23, an Act which does not apply to Scotland.

Subsection (2).—*Treason-felony.*

183. In 1848 an Act was passed to enable the ordinary criminal Courts to try and punish in the usual way treasonable practices of minor political significance, without the necessity of dealing with them as high treason. By this statute [4] it was provided (s. 3) that "if any person whatsoever shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our most gracious lady the Queen, her heirs or successors, from the style, honour, or royal name of the imperial crown of the United Kingdom, or of any other of Her Majesty's dominions and countries, or to levy war against Her Majesty, her heirs or successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or counsels, or to put any force or constraint upon, or in order to intimidate or overawe both Houses, or either House of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom or any other of Her Majesty's dominions or countries under the obeisance of Her Majesty, her heirs and successors; and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed," he shall be guilty of felony.

184. This statute thus makes the crime of treason-felony consist in—

1. Devising the deposition of the Sovereign or successors; or
2. Devising the levying of war on the Sovereign in order to—
   (1) Compel a change of measures or counsels.
   (2) Intimidate Parliament.
   (3) Stir up or induce foreign invasion.

The crime is complete when such devising has been—

(*a*) published in print or writing;
(*b*) openly and advisedly spoken of; [5]
(*c*) indicated by overt act or deed.

It is competent to try under the statute offences which may amount

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[1] 30 Geo. III. c. 48.
[2] 54 Geo. III. c. 146.
[3] *Gordon* v. *H.M. Adv.*, 1754, 1 Pat. 558.
[4] 11 Vict. c. 12.
[5] Macdonald, p. 232; Anderson, p. 60; Kenny, Outlines of Criminal Law, 12th ed., p. 275.

to high treason (s. 7). The statutory penalty is penal servitude [1] for life, or any period not less than seven years, or imprisonment [2] not exceeding two years, with or without hard labour. There has been only one prosecution under the statute in Scotland.[3]

Subsection (3).—*Misprision of Treason.*[4]

185. The term misprision is derived from the old French *mes*, wrongly, and *prendre*, to take. In the law of England the term, in its widest signification, denotes every serious misdemeanour which has no *nomen juris*. By the law of that country, a misprision is held to be implied in every treason or felony, so that a person may be proceeded against either for the treason-felony or for a misprision only. In England, however, the term is now rarely used in this wide sense, but is practically confined to the two phrases, misprision of treason and misprision of felony.

The crime of misprision of treason consists in knowing of a treasonable act and failing to communicate this knowledge, with all reasonable speed, to a judge or justice of the peace. It follows that whenever a new treason is enacted, there results a new misprision of treason. If the guilt exceed a bare failure to reveal, the charge will not be limited to misprision. The conduct of the accused may be such as to warrant his being indicted for high treason. The mode of prosecution for misprision of treason is the same as that provided for high treason. The punishment is perpetual imprisonment, forfeiture of goods, and of the profits of lands during the life of the offender.

Subsection (4).—*Assaults on the Sovereign.*[5]

186. By a statute [6] which reserves entire the treason law, the discharge or pointing, aiming or presenting of firearms at or near the Sovereign's person whether loaded or not, or use of explosives or bearing of weapons with intent to injure or alarm the Sovereign is made a crime. The punishment to which a person convicted under this statute is liable is penal servitude for seven years, or imprisonment with or without hard labour, for any period not exceeding three years, and during the imprisonment to be publicly or privately whipped in the manner and form which the Court shall direct.

Subsection (5).—*Leasing Making.*

187. Leasing making, or *lese-majesty*, as it is more familiarly called, has been defined as "a verbal injury directed against the King; pro-

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[1] 20 & 21 Vict. c. 3, and 27 & 28 Vict. c. 47. [2] 54 & 55 Vict. c. 69.

[3] *Cumming and Others*, 1848, J. Shaw 17; see also *Mulcahy* v. *The Queen*, 1868, L.R. 3 H.L. 306, 328.

[4] Hume, i. 551; Ersk. iv. 4, 28; Bankt. ii. 261; More, ii. 397; Swin. Abridg. *voce* "Treason"; Sweet's Law Dict., *sub voce*; Macdonald, p. 232; Anderson, p. 59; Kenny, Outlines of Criminal Law, 12th ed., p. 279. [5] Macdonald, p. 233.

[6] 5 & 6 Vict. c. 51, s. 2, as amended by 4 & 5 Geo. V. c. 58, s. 44, Sched. 4.

ceeding, or in the construction of law understood to proceed, from an evil disposition with respect to him, and intended to do him prejudice as a person." [1] The original meaning seems to have been broader, for by a statute of Robert I. it is ordained "quod nullus sit conspirator nec inventor narrationum, seu rumorum, per quos materia discordiæ poterit oriri inter dominum regem et populum suum." The subsequent statutes against leasing making [2] condescend upon various ways in which the crime may arise, as "giving evil information," uttering speeches to the "disdain, reproach, and contempt of His Majesty," depraving his laws and Acts of Parliament, interfering between the King and his nobility; and they impose the punishment of death upon all who are guilty of any form of the crime. The last-named statute even extends the like pains against "quhaever heares the said leesinges, calumnies, or slanderous speeches . . . and apprehends not the authors thereof or reveilis not the same." Finally, the Act of 1609, c. 9, was directed against those who raised discord between the inhabitants of the two kingdoms by writings or speeches tending to the remembrance of the ancient grudges between them. The severity of these statutes was declared a grievance in the Claim of Right. They had been unjustly used, notably in the case of the *Earl of Argyle*; [3] and accordingly, by 1703, c. 4, the punishment was declared to be an arbitrary one. The penalty was still further reduced by 6 Geo. IV. c. 47, to fine and imprisonment, or, in case of a second conviction, banishment. By 7 Will. IV. c. 5, the punishment of banishment as relating to this offence was abolished.

Subsection (6).—*Seducing Royal Forces to Mutiny or Desertion.*

188. Any person who maliciously and advisedly seduces any person of the Royal (land, sea, or air) Forces from his allegiance, or who incites or stirs up any such person to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, is liable to penal servitude for life, or not less than fourteen years, or imprisonment not exceeding three years.[4]

Subsection (7).—*Assisting Prisoners of War to Escape.*

189. It is criminal [5] to assist the escape of prisoners of war. The crime may be committed both in the King's dominions and on the high seas. Such acts are also crimes at common law.[6]

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[1] Hume, i. 351; see Macdonald, p. 234.
[2] 1424, c. 43; 1540, c. 83; 1584, c. 134; 1585, c. 10; and 1594, c. 209.
[3] 3 St. Tr. 441.
[4] 37 Geo. III. c. 70; 57 Geo. III. c. 7; 7 Will. IV. & 1 Vict. c. 91, s. 1; 20 & 21 Vict. c. 3, s. 2.
[5] 52 Geo. III. c. 156.
[6] Hume, 1, 527; Macdonald, p. 240.

SUBSECTION (8).—*Breach of Neutrality.*

(i) *Foreign Enlistment: Supplying Ships to Belligerent State.*

190. These matters are regulated by the Foreign Enlistment Act.[1] The object of the Act is to preserve Britain's neutrality by prohibiting British subjects from giving assistance to foreign belligerents.[2] The Act extends to "all the dominions of the King, including the adjacent territorial waters" (s. 2). It applies to British subjects everywhere, whether within the King's dominions or not,[3] and also to foreigners within the King's dominions.[4] Sec. 4 enacts penalties against any such person who himself enlists in the military or naval service of a foreign belligerent who is at peace with this country or who induces others so to enlist. The Act also prohibits persons from leaving the King's dominions with intent to serve a foreign belligerent (s. 5); embarking persons on false representations as to service (s. 6); taking illegally enlisted persons on board ship (s. 7); building, equipping, despatching,[5] or even agreeing to build a ship with intent or knowledge or reasonable cause to believe that it will be employed in the military or naval service of a foreign belligerent (s. 8); preparing any naval or military expedition to proceed against the dominions of any State that is at peace with Britain.[3]

Offences under the Act are punishable by fine or by imprisonment, not exceeding two years (s. 13).

(ii) *Fighting against the King's Allies.*

191. Fighting against the King's allies is a crime and is punishable as an adherence to the King's enemies.[6]

SUBSECTION (9).—*Wrongfully obtaining or disclosing Public Secrets.*[7]

192. This offence is dealt with by the Official Secrets Act, 1911,[8] as amended by the Official Secrets Act, 1920.[9] If any person for any purpose prejudicial to the safety or interests of the State (*a*) approaches, inspects, or enters a "prohibited place" (which includes any Government work of defence, arsenal, factory, dockyard, camp, ship, telegraph or signal station, or place used for building, repairing, or storing ships, arms or materials of war, or documents relating thereto); (*b*) makes any sketch, plan, model, or note which might be useful to an enemy; (*c*) obtains or communicates any such sketch, etc., to any other person, he is guilty of a felony, and liable to penal servitude

[1] 33 & 34 Vict. c. 90.

[2] For fuller treatment of the historical and international aspects of this subject see Russell on Crimes, 8th ed., i. 288 *et seq.*; Kenny, Outlines of Criminal Law, 12th ed., p. 319; see also Macdonald, p. 238; Anderson, p. 65.

[3] *R.* v. *Jameson*, [1896] 2 Q.B. 425, at p. 430.

[4] *R.* v. *Jameson, supra*; *R.* v. *Sandoval*, 1887, 16 Cox 206.

[5] *Dyke* v. *Elliott*, 1872, L.R. 4 P.C. 184.

[6] Hume, i. 529; Alison, i. 613; Macdonald, p. 230.

[7] Russell on Crimes, p. 318 *et seq.*

[8] 1 & 2 Geo. V. c. 28.

[9] 10 & 11 Geo. V. c. 75.

for not less than three and not exceeding seven years.[1] If a person (*a*) having in his possession any secret official code, word, etc., or any sketch, document, etc., relating to a "prohibited place" or used therein,[2] or which has been entrusted to him by any person holding office under His Majesty, or obtained by him as holding such a position, or as a person who holds or has held or is employed under a contract made on behalf of His Majesty, either communicates it to a person to whom he is not authorised to communicate it or to whom it is against the interest of the State to communicate it, or uses it to the prejudice of the safety or interests of the State, or retains it in his own possession contrary to his orders or duty; (*b*) receives any such sketch, document, etc., knowing or having a reasonable belief that it has been communicated to him in contravention of the Act, unless he can prove that he received it unwillingly (s. 2) he is guilty of a misdemeanour and liable to imprisonment with or without hard labour for a term not exceeding two years, or to a fine, or to both (s. 2). Harbouring spies is a misdemeanour (s. 7). Attempting or inciting to commit an offence under the Act is felony or misdemeanour according as the offence is itself a felony or misdemeanour (s. 4).

193. The 1920 Act, in addition to amending some of the provisions of the 1911 Act, creates certain other offences such as where anyone for the purpose of gaining admission to a prohibited place, wears official uniform, forges a passport, or personates an official.[1] The Act also deals with foreign agents and communications between them and British subjects. It provides for the registration of those who carry on the business of receiving letters, telegrams, etc.

Section 3.—Crimes against Law and Order.

Subsection (1).—*Mobbing and Rioting.*

194. In the law of Scotland mobbing or "the tumultuous convocation of the lieges" consists in the assembling of a number of people and their combining against order and peace, to the alarm of the lieges.[3] The term includes the several degrees and stages of disorder which are known in the law of England under the names of "riot," "rout," and "unlawful assembly."[4] In Scotland these distinctive terms are not in use and

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[1] 10 & 11 Geo. V. c. 75, s. 1. [2] *R.* v. *Simington*, [1921] 1 K.B. 451.

[3] Hume, i. 418, 419; Alison, i. 509 *et seq.*; More, ii. 400; Macdonald, p. 181; Anderson, p. 69; *H.M. Adv.* v. *Martin*, 1886, 1 White 297, per Lord Mure at p. 303; *Robertson*, 1842, 1 Broun 152, per Lord Justice-Clerk Hope at p. 192; *H.M. Adv.* v. *Nicolson*, 1887, 1 White 307; *H.M Adv.* v. *Macrae*, 1888, 15 R. (J.) 33; 1 White 543; *Sloan* v. *Macmillan*, 1922, J.C. 1.

[4] Hume, i. 416. For the meaning of these terms in the law of England see Russell on Crimes, 8th ed., p. 414 *et seq.* An unlawful assembly is an assembly of three or more persons from which a breach of the peace may be reasonably apprehended; a rout differs from an unlawful assembly only in the fact that the persons have already made a motion towards the execution of their purpose; while a riot is where they are executing their purpose; a riot in England being a tumultuous assembling of three or more persons to the disturbance of the peace and the terror of at least one of His Majesty's subjects.

these varying degrees affect only the measure of punishment and not the denomination of the crime. The chief elements in the crime are (1) an assembly of a number of people, (2) combination, (3) an illegal purpose, and (4) the alarm of the lieges and the disturbance of the public peace.

195. There must be an assembly of a number. No number has been fixed as a minimum to constitute a mob.[1] Whether the assemblage amounts to a mob or not is to be decided on the whole circumstances of each case, according to the temper and purpose of the meeting and the nature and degree of the excesses to which they proceed.[2] In *Gollan's* case[3] Lord Moncreiff said: "Mobbing and rioting consist in a combination of persons for a common purpose to attain an object which cannot be attained without numbers, and an object to be effected by reasons of the numbers—that is, by force." Under the Riot Act[4] twelve persons are sufficient to constitute a riot.

196. There must be combination or joint purpose.[5] The mere presence or assembling of a number of people is not enough. Nor is an affray such as the sudden break-out of a quarrel among a crowd of people, however great their numbers, who have no hostile purpose against the peace of the neighbourhood sufficient to infer mobbing, unless the disturbance continues so long or develops in such fashion as to indicate that there is a combination for some purpose. This does not mean that an understanding or combination among the members of an assembly must be deliberate or antecedent to their meeting. "There may be and often is a substantial and sufficient, though a sudden and tumultuary, consent on such occasions, and amongst persons who at a meeting had no settled purpose of mischief."[6]

197. The combination must be for an illegal purpose. This illegal purpose may be present *ab initio* as where a meeting is called for the doing of something by illegal means. Or the illegal purpose may supervene,[7] although the original purpose of the assembly may have been legal. As the essence of the crime lies in attaining or seeking to attain some object not by the ordinary processes of law, but by force, it can be no justification of the crime that those who committed it were actuated by high religious or moral principles[3] or were seeking to vindicate a public right.[5] In the former case there are other methods by which their propaganda can be carried out legally, while in the latter case, the Courts are the proper place in which to seek a remedy.[3] If it be illegal for an individual to take the law into his own hands, it is even

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[1] Hume, i. 416; Alison, i. 510; Macdonald, p. 181; *H.M. Adv.* v. *Blair*, 1868, 1 Coup. 168; *Sloan* v. *Macmillan*, 1922 J.C. 1, at p. 6.

[2] Hume, *supra*.

[3] *H.M. Adv.* v. *Gollan*, 1883, 5 Coup. 317, at p. 322. In this case certain persons who assembled with a crowd at a pier for the purpose of preventing what they considered to be Sabbath desecration by overpowering the police and preventing unloading of certain ships on a Sunday, were convicted of mobbing.

[4] 1 Geo. I. c. 5.

[5] *Wild*, 1854, 1 Irv. 552, per Lord Cowan at p. 558; *Sloan* v. *Macmillan*, *supra*.

[6] Hume, i. 418.

[7] *Robertson*, 1842, 1 Broun 152, at p. 193.

more so for a number of persons acting in concert. The offence may be committed even in the execution of a perfectly lawful purpose, if the execution be carried out in a violent and outrageous fashion.[1] It is not essential that the particular unlawful purpose be set forth, as there are many mobs for the assembly of which it may be difficult to find any object or purpose.[2] The common object in mobbing must be some local or private matter and not the attainment of any general or national object, in which case it tends to merge into treason.[3] But a political riot is merely mobbing if it be local in its origin and scope.

198. The assembly must be to the alarm of the lieges and the disturbance of the public peace.[4] A quiet meeting, however criminal, is not a mob.[5] On the other hand, where an assemblage is such that there is reasonable ground for apprehending danger to the lieges, it may be a mob, although in point of fact it commits no act of violence. It is sufficient if the mob assembles for the purposes of intimidation.[6]

199. All disorderly acts of a mob are chargeable against every individual who is present in the concourse; it is not necessary to prove the acts against the persons separately.[7] Any individual who does not side with the authorities, or leave the mob, makes himself responsible by his presence for the acts of the mob.[8] What constitutes presence in a mob is a question depending on the particular circumstances of the case. The continued presence of a party in a mob after its character has shewn itself, raises a strong presumption of guilt.[9] But each member of the mob is not guilty of a serious crime perpetrated by one individual provided that it was not so perpetrated in pursuance of the common purpose of the assemblage.[10]

200. The punishment is either penal servitude or imprisonment. The Riot Act[11] provides that if twelve or more persons, "being unlawfully, riotously, and tumultuously assembled together to the disturbance of the public peace," and being required or commanded by one or more justices of the peace, or the Sheriff of the county, or other qualified magistrate, to disperse themselves, shall, to the number of twelve or more, "unlawfully, riotously, and tumultuously" continue together for an hour after the command, they shall be liable to penal servitude for life or not less than fifteen years, or to imprisonment not exceeding three years.

201. The order and form of proclamation is as follows:—The magistrate "shall, among the said rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded

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[1] *Robertson*, 1842, 1 Broun 152, at p. 193.
[2] *Hart*, 1854, 1 Irv. 574, at p. 577.
[3] Allison, i. 513.
[4] Hume, i. 416; Alison, i. 510.
[5] Macdonald, p. 182.
[6] *Sloan* v. *Macmillan*, 1922 J.C. 1, at p. 7.
[7] Hume, i. 423, and cases there cited; *Cairns*, 1837, 1 Swin. 597; *Robertson, supra*, 195.
[8] *Wild*, 1854, 1 Irv. 552, at p. 559.
[9] *Robertson, supra*, at p. 194.
[10] *Marshall*, 1824, Alison, i. 524; *Cairns, supra*; *Robertson, supra*, 196–7; Macdonald, p. 184.
[11] 1 Geo. I. c. 5; amended as to punishment by 7 Will. IV. & 1 Vict. c. 91; 20 & 21 Vict. c. 3; Hume, i. 434; Alison, i. 530; Macdonald, p. 186; Anderson, p. 71.

silence to be while proclamation is making, and after that shall openly and with loud voice make or cause to be made proclamation in these words or like in effect:—

> Our Sovereign Lord the King chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the Act made in the first year of King George (the First) for preventing tumults and riotous assemblies. "God save the King!"

The proclamation cannot be made by an ordinary constable or police officer.[1] Any persons who by force and arms prevent the proclamation from being made are liable to punishment. Those who know that the proclamation has been prevented are deemed to be in the same position as persons who have heard it read. If it is actually read, all present are deemed to have heard it.

202. Offenders against the Riot Act must be prosecuted within a year of the commission of the offence. The Act indemnifies those who, after the expiration of the statutory hour, have to use force for the dispersing or arresting of the rioters (s. 3). Irrespective of the statute there is a common law right inherent in all citizens, whether in a private or official capacity, to quell a mob.[2]

Subsection (2).—*Sedition.*

203. Sedition comprises all these practices, whether by deed, word, or writing, or of whatsoever kind, which are suited and intended to disturb the tranquillity of the State for the purpose of producing public trouble or commotion, and moving His Majesty's subjects to the dislike, resistance, or subversion of the established government and laws, or settled frame and order of things.[3] Mere criticism of the Government is not enough, however ungovernable and violent such criticism be. The language used must be calculated to excite popular disaffection and resistance to lawful authority.[4] There is no need to prove intention on the part of the pannel to bring about such a result;[5] it is sufficient that tumult and violence are the likely sequences of his conduct. Where there is actual tumult and violence, it will depend on the circumstances of the case whether or not the common law crime of sedition has merged into the statutory one of treason. Formerly sedition was punished by an arbitrary sentence. The Act Geo. IV. c. 67 restricted the sentence to one of fine and imprisonment, with an alternative of banishment on a second offence. This alternative was taken away by 7 Will. IV. c. 5.

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[1] Hume, i. 435; Macdonald, p. 187.

[2] Kenny, Outlines of Criminal Law, 12th ed., p. 287; Dicey, Law of the Constitution, chap. viii.

[3] Hume, i. 553. Hume's definition is exhaustively discussed by Lord Justice-Clerk Hope in *Grant*, 1848, Shaw (Just.) 17, at p. 85 *et seq.*; see also Alison, i. 581; Macdonald, p. 235; Anderson, p. 61.

[4] Per Lord Mackenzie in *Grant, supra*, at p. 96.

[5] *Grant, supra*, per Lord Moncreiff at p. 110, and per Lord Cockburn at p. 111.

SUBSECTION (3).—*Unlawful Oaths.*[1]

204. By the Act 37 Geo. III. c. 123, any person administering or being a party to the administering or taking of any oath or engagement (*i.e.* any obligation in the nature of an oath, however administered or taken, and whether administered by others or taken without being administered), purporting to bind the person taking the same "to engage in any mutinous or seditious purpose; or to disturb the public peace; or to be of any association, society, or confederacy formed for any such purpose; or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander or other person not having authority by law for that purpose; or not to inform or give evidence against any associate, confederate, or other person; or not to reveal or discover any unlawful combination or confederacy; or not to reveal or discover any illegal act done or to be done; or not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement, shall . . . be adjudged guilty of felony, and may be transported for any term of years not exceeding seven years." The same punishment was laid down for those taking such oaths.[2] Penal servitude was substituted for transportation by 20 & 21 Vict. c. 3, and 27 & 28 Vict. c. 47. Compulsion is not a sufficient defence to an indictment on the above offence unless the oath and the circumstances of it are revealed within four days from the cessation of such compulsion, or of any sickness which prevents a disclosure. It must be revealed to a justice of the peace, or Secretary of State, or privy councillor, or, in case of a soldier or sailor, to his commanding officer.[3] Where the oath is one taken in furtherance of treason, murder, or any capital crime, the punishment is penal servitude for life, or not less than fifteen years, or imprisonment not exceeding three years, with or without hard labour, and solitary confinement, the latter not to exceed one month at a time, or three months in each year.[4]

205. Debating societies, consisting of persons bound together by an oath of secrecy, were struck at by the Acts 36 Geo. III. c. 7; 37 Geo. III. c. 123; 39 Geo. III. c. 79; and 52 Geo. III. c. 104. These debating societies were a cloak for seditious or treasonable meetings during the period of the French Revolution. These Acts are now for the most part repealed.[5]

SUBSECTION (4).—*Illegal Drilling.*[6]

206. In 1819 an Act was passed [7] to prevent the training of persons to the use of arms and to the practice of military evolutions and exercise.

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[1] Macdonald, pp. 235, 236; Hume, ii. 556 n., 557 n.; see *R.* v. *M'Kinley*, 1817, 33 St. Tr. 275. [2] 37 Geo. III. c. 123, s. 1. [3] *Ibid.*, s. 3.
[4] 52 Geo. III. c. 104 (amended 7 Will. IV. & 1 Vict. c. 91); 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47. [5] 32 & 33 Vict. c. 24.
[6] Russell on Crimes, 8th ed., p. 430. [7] 60 Geo. III. & 1 Geo. IV. c. 1.

By this statute it is provided (s. 1) that all meetings and assemblies of persons for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercise, movements, or evolutions, without any lawful authority from His Majesty, or the Lieutenant or two Justices of the Peace of any county or riding, or of any stewartry, by commission or otherwise, for so doing, are prohibited. The punishment for attending such meetings or assemblies for the purpose of drilling or training others, or assisting in so doing, is penal servitude for seven years, or imprisonment for two years; and for attending such meetings or assemblies for the purpose of being drilled or trained it is fine and imprisonment not exceeding two years. Persons so assembled may be dispersed, or detained and required to give bail, and prosecuted (s. 2). Every action or suit brought against any inferior judge or officer of the law for anything done by them in pursuance of the Act must be commenced within six calendar months of the facts committed; and if the defenders are successful in such action or suit, they are to be entitled to treble costs or expenses (s. 6). No person shall be prosecuted for an offence against the Act unless such prosecution shall be commenced within six calendar months after the offence committed (s. 7).

Subsection (5).—*Breach of the Peace.*[1]

207. This crime is committed when the accused has annoyed or disturbed the lieges, and has broken the peace of the community. It differs from mobbing in respect that the elements of combination and common purpose are absent. It is, therefore, committed either by individuals or by groups of individuals which lack the characteristics of a mob. Breach of the peace is generally committed in the public streets. Such an offence is usually prosecuted under the Police Acts, either general or local. But outrageous conduct on the streets is also an offence at common law.[2] The crime may equally well be committed in the country as where a crowd of persons invade a farm in such numbers as to alarm the lieges.[3] Disorderly conduct at a public meeting [4] or disturbance of public worship in church [5] may constitute the crime. It may also be committed in a private house or private premises.[6]

208. As to conduct which amounts to breach of the peace, in *Ferguson* [7] it was laid down: "Breach of the peace consists in such acts

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[1] Hume, i. 442; Alison, i. 579; Macdonald, p. 188; Anderson, p. 71; Chisholm's Barclay's Digest, p. 55.

[2] *Ainslie*, 1842, 1 Broun 25.

[3] *Macbeath* v. *Fraser*, 1886, 14 R. (J.) 16; 1 White 286.

[4] *Sleigh* v. *Moxey*, 1850, J. Shaw, 369; *Hendry* v. *Ferguson*, 1883, 5 Coup. 278; 10 R. (J.) 63; *Armour* v. *Macrae*, 1886, 13 R. 41; 1 White 58. Endeavouring to break-up a meeting, etc., is also a statutory offence under the Public Meetings Act, 1908, 8 Edw. VII. c. 66.

[5] *Fraser*, 1839, 2 Swin. 436; *Dougall* v. *Dykes*, 1861, 4 Irv. 101. Disturbance of public worship was formerly prosecuted as profanity under the Act 1587, c. 27.

[6] *Matthews & Rodden* v. *Linton*, 1860, 3 Irv. 570; *Ferguson* v. *Carnochan*, 1889, 16 R. (J.) 93; 2 White 278.

[7] *Supra*, 2 White, per Lord Justice-Clerk Macdonald at p. 281, and Lord M'Laren at p. 282.

as will reasonably produce alarm in the minds of the lieges—not necessarily alarm in the sense of personal fear, but such alarm as causes them to believe that what is being done causes or will cause real disturbance to the community, and the breaking-up of the peace of the neighbourhood." "Where there is brawling and where offensive language is used, it is not necessary that those who hear it should be alarmed for their personal safety. It is enough if the conduct of those who are found brawling and using the offensive language is such as to excite reasonable apprehension that mischief may ensue to the persons who are misconducting themselves or to others." It is a question of circumstances whether an act or acts do in fact constitute a breach of the peace. Thus, conduct which might constitute a breach of the peace at one type of public meeting might not be so regarded at a meeting of a different type.[1] Insulting language does not, *per se*, amount to breach of the peace,[2] unless it is unduly protracted, or is accompanied by threats or violent gestures, or is itself of such a nature as to tend to produce a breach of the peace.[3] Moreover, any language, whether spoken or written, which is calculated and intended to induce others to commit a breach of the peace is a crime.[4]

209. The following are examples of this crime. Riotous assembling in circumstances which do not amount to mobbing.[5] Challenging a person to fight.[6] Fighting or duelling.[7] Writing and sending a letter threatening harm to person or property.[8] Shouting in the streets, if repeated deliberately and intentionally to create a disturbance.[9] Disorderly processions in the street.[10] Disorderly street preaching.[11] Injury to property by a number of persons.[12]

210. This crime may be prosecuted at common law,[13] but the usual course is summary prosecution in the Police Courts.

Subsection (6).—*Conspiracy.*[14]

211. At common law it is itself a crime to conspire for the purpose of committing crime. Hume says that "process is properly brought

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[1] *Armour* v. *Macrae*, 1886, 13 R. 41; 1 White 58.

[2] *Galbraith* v. *Muirhead*, 1856, 2 Irv. 520; *Buist* v. *Linton*, 1865, 5 Irv. 210; *Banks* v. *M'Lennan*, 1876, 3 Coup. 359; 4 R. (J.) 8; *Marr* v. *M'Arthur*, 1878, 4 Coup. 53; 5 R. (J.) 38.

[3] *Durrin & Stewart* v. *Mackay*, 1859, 3 Irv. 341. Such language is also an offence under certain burgh statutes. Macdonald, p. 189.

[4] *H.M. Adv.* v. *M'Donald*, 1887, 1 White 315.

[5] *M'Cabe*, 1838, 2 Swin. 20; *Duncan*, 1843, 1 Broun 512; *Currie*, 1864, 4 Irv. 578; *Macdougall* v. *Maclullich*, 1887, 1 White 328; 14 R. (J.) 17; *Bewglass* v. *Blair*, 1888, 1 White 574; 15 R. (J.) 45.

[6] *M'Kechnie*, 1832, Bell's Notes, 111.

[7] *Burn*, 1842, 1 Broun 1; *Rodgers* v. *Henderson*, 1892, 3 White 151; 19 R. (J.) 40.

[8] *Hunter*, 1838, 2 Swin. 1.

[9] *Ritchie* v. *M'Phee*, 1882, 5 Coup. 147; 10 R. (J.) 9.

[10] *Deakin* v. *Milne*, 1882, 5 Coup. 174; 10 R. (J.) 22; *Whitchurch* v. *Millar*, 1895, 23 R. (J.) 1; 2 Adam 9.

[11] *Hutton* v. *Main*, 1891, 3 White 41; 19 R. (J.) 5.

[12] *Stevenson* v. *Lang*, 1878, 4 Coup. 76; *Macbeath* v. *Fraser*, 1886, 14 R. (J.) 16; 1 White 286.

[13] See *Banks* v. *M'Lennan*, *supra*.

[14] Hume, i. 170; Macdonald, p. 245; Anderson, p. 73.

under this generic name, for any sort of conspiracy or machination directed against the fame, safety, or state of another, and meant to be accomplished by the aid of subdolous and deceitful contrivances, to the disguise or suppression of the truth." Thus it is criminal to conspire to accuse others falsely of crime.[1] It is a crime to conspire to murder, or to conspire to commit house-breaking.[2] It is also criminal to conspire to extort money.[3] Conspiring to raise wages or to concuss workmen or to effect some similar purpose by the use of violence or threats is a crime at common law.[4] It is a crime at common law to procure one individual to personate another, so as to defeat or obstruct the administration of justice.[5] It is a good common-law charge, if no statute expressly excludes it, to indict for conspiracy to effect an alteration of the laws and constitution of the realm by force and violence, or by armed resistance to lawful authority.[6] The punishment of the common-law crime of conspiracy is an arbitrary one. Intimidation of workingmen is dealt with by the Conspiracy and Protection of Property Act, 1875.[7]

Subsection (7).—*Intimidation.*

212. As already pointed out the concussing of workmen by threats is a common-law offence. The matter of intimidation [8] is also provided against by statute. The Conspiracy and Protection of Property Act, 1875,[9] makes criminal the following acts if done with a view to compel any person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing: (1) using violence or intimidation to such person or his wife and children or injuring his property; (2) persistently following [10] such person about; (3) hiding tools or property belonging to such person; (4) watching or besetting [10] such person's house or place of business; (5) following such person with two or more other persons in a disorderly manner in or through any street or road.[11] It is not necessary that the accused should have been successful in his efforts to compel. The overt act for the purpose of compelling is sufficient.[12]

213. The Trades Disputes Act, 1906,[13] enacts that it shall be lawful for one or more persons in contemplation or furtherance of a trade dispute to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information,

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[1] Hume, i. 170–1, and cases of *Muschet*, 1721, and *Elliot*, 1694, there referred to.
[2] Burnett, p. 231.
[3] Hume, i. 342.
[4] Burnett, pp. 225–37; *Hunter*, 1837 and 1838, 1 Swin. 550; 2 Swin. 1; *Sprot*, 1844, 2 Broun 179.
[5] *Rae*, 1845, 2 Broun 476.
[6] *Cumming*, 1848, J. Shaw 17.
[7] See para. 212, *infra*.
[8] Macdonald, p. 178; Anderson, p. 165.
[9] 38 & 39 Vict. c. 86.
[10] *Wilson* v. *Renton*, 1910 S.C. (J.) 32; 6 Adam 166.
[11] *M'Kinlay* v. *Hart*, 1897, 25 R. (J.) 7; 2 Adam 366; *Stuart* v. *Clarkson*, 1894, 22 R. (J.) 5; 1 Adam 466.
[12] *Agnew* v. *Munro*, 1891, 18 R. (J.) 22; 2 White 611.
[13] 6 Edw. VII. c. 47, s. 2.

or of peacefully persuading any person to work or abstain from working. Nevertheless, it is not necessary that the complaint should contain an express charge of intimidation [1]—nor is it necessary to set forth the particular subsections of the 1875 Act said to be contravened. The offences under the 1875 Act remain offences despite the 1906 Act, the effect of which is merely to allow the accused to put forward a particular defence.[2]

SUBSECTION (8).—*Duelling.*

214. To challenge another to fight a duel is, according to the law of Scotland, a criminal offence at common law. The practice of duelling was at one time so prevalent in Scotland, that the Legislature endeavoured to repress it by the enactment of severe statutory penalties. The Act of 1600, c. 12, prohibited the actual fighting of a duel. The Statute of 1696, c. 35, was subsequently passed to restrain the mere giving or accepting a challenge to fight. By that Act it was provided "that whosoever, principal or second, or other interposed person, gives a challenge to fight a duel or single combat, or whosoever accepts the same, or whosoever, either principal or second on either side, engages therein, albeit no fighting ensue, shall be punished by the pain of banishment and escheat of moveables, without prejudice to the Act already made against the fighting of duels." The challenge had to be direct, serious, and regular. But if the challenge was duly formal, the language of the statute applied not only to the challenger and the challenged, but also to the person who bore the challenge, and to those who were present at the duel as spectators, if they were there by design.[3] The Acts of 1600 and 1696 were repealed by 59 Geo. III. c. 70. Although it is competent to libel challenging to fight as a substantive crime at common law, this offence is now charged and dealt with as a breach of the peace.[4] Seconds are also punishable.[5] The killing of an adversary in a duel is now regarded as murder at common law, even though the survivor be the person challenged.[6]

SUBSECTION (9).—*Procuring another to Commit a Crime.*[7]

215. Where an offence is actually committed, one who has procured its perpetration is guilty of the crime itself. But even where the offence has not been perpetrated, a person seeking to procure it is guilty of an offence at common law.[8] By the Post Office Act [9] it is made criminal to endeavour to procure any person to commit an offence under the Post Office Acts.

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[1] *Wilson* v. *Renton*, 1910 S.C. (J.) 32; 6 Adam 166; *Stuart* v. *Clarkson*, 1894, 22 R. (J.) 5; 1 Adam 466.
[2] *Wilson* v. *Renton*, *supra*, per Lord Justice-Clerk Macdonald, 1910 S.C. (J.) at p. 39.
[3] Ersk. iv. 4, 49.
[4] Macdonald, p. 188 *et seq.*; Hume, i. 442; Alison, i. 53.
[5] *Burn*, 1842, 1 Broun 1.
[6] Hume, i. 230; Alison, i. 53; Macdonald, p. 124.
[7] Macdonald, p. 245; Anderson, p. 74.
[8] This is now made statutory by s. 61 of the Criminal Procedure Act, 1887.
[9] 8 Edw. VII. c. 48.

Subsection (10).—*Reckless or Culpable Use of Firearms.*[1]

216. The discharge of firearms, whether the result be to injure anyone or not, is an offence, if the circumstances are such that blame is reasonably to be imputed to the person who has discharged the weapon. If the firearm has been fired at anyone wilfully, the person who has fired it may be charged with a contravention of the Act 10 Geo. IV. c. 38, with aggravated assault, or with culpable and reckless use of firearms. But it is not necessary that the weapon should be aimed at anyone, or that there should be intent to injure anyone. If the act is done with a reckless disregard of consequences, or even if the discharge is merely calculated to disturb the minds of the lieges, the person who fires is liable to criminal proceedings. Thus firing into a house to intimidate the residents,[2] or in wanton recklessness, are offences, although no one was in the room fired into.[3] If anyone, unknown to the accused, was in the room, and was injured, this would be an aggravation.[4] But obviously there are many cases where a relevant charge is or may be made, where there is no intention to injure or alarm, but merely thoughtlessness.[5] Thus a sportsman who fires at a bird without paying attention to people being at work in the line of fire within a dangerous distance is liable to prosecution; and an indictment would probably lie against the man who peppers another in a grouse path, the *locus* of which has been pointed out to him, or hits his neighbour who has kept his place in line in turnips. The punishment may be penal servitude, but is generally imprisonment or a fine.

Subsection (11).—*Spring-guns.*[6]

217. The setting of spring guns to kill or maim poachers, or other persons, entering ground whether enclosed or unenclosed, for purposes whether lawful or unlawful, is illegal, and if harm result, the setter of the instrument may be prosecuted for homicide or unlawful wounding.[7] It is probably lawful, however, to set these instruments against burglars breaking into a dwelling-house, provided care be taken that none but burglars are exposed to the danger. In England the matter is regulated by statute;[8] but the statute does not apply to Scotland, where the common law was considered to be sufficiently virile to deal with the matter. It seems doubtful whether in Scotland a prosecution could be sustained if no harm had resulted.

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[1] Macdonald, p. 194; *H.M. Adv.* v. *Phipps*, 1905, 4 Adam 616.
[2] *Sprot*, 1844, 2 Broun 179.
[3] *Smith*, 1842, 1 Broun 240; Bell's Notes, 76.
[4] Macdonald, p. 194.
[5] *Johnston*, 1842, 1 Broun 214; Bell's Notes, 76; *Turner*, 1853, 1 Irv. 284.
[6] Bell's Prin., s. 961; Hume, i. 219; Rankine, Land-Ownership, p. 130; Irvine, Game Laws, p. 81.
[7] *Craw*, 1826, Syme 188, 210; Shaw (Just.) 194.
[8] 24 & 25 Vict. c. 100, s. 31.

Subsection (12).—*Offences against the Firearms Act*, 1920.

218. The possession, manufacture, and sale of firearms is now regulated by the Firearms Act, 1920.[1] Under this statute a person shall not purchase, have in his possession, use or carry any firearm or ammunition unless he holds a certificate from the chief officer of police of the district. Sec. 2 puts restrictions on the manufacture and sale of firearms. By s. 7 is enacted "Any person who has in his possession or under his control any firearm or ammunition with intent by means thereof to endanger life or cause serious injury to property, or to enable any other person by means thereof to endanger life or cause serious injury to property, shall, whether any injury to person or property be caused or not, be deemed to have been guilty of an offence under s. 3 of the Explosive Substances Act, 1883,[2] and the provisions of that Act shall apply accordingly." The Act does not apply to antique firearms nor in certain circumstances to war trophies.[3]

Subsection (13).—*The Criminal Use of Explosives.*[4]

219. By the Explosive Substances Act, 1883,[5] it is made an offence to carry an explosive likely to endanger life or damage property. Acting with intent to cause explosion or making or possessing explosives with such intent are also criminal. Sending explosives to anyone with intent to injure is a common law crime.[6]

Section 4.—Crimes connected with the Administration of Justice.

Subsection (1).—*Beating and Defaming Judges.*

220. The Act 1593, c. 177, provides that whosoever should strike or hurt any judge, sitting in judgment, should incur the penalty of death, and be accused criminally therefor. This same statute, it may be noted, provides further, that if any person strikes, hurts, or slays another within the inner Tolbooth, while the Lords of Session are sitting for the administration of justice, he shall incur the pain of treason; if anyone strikes or hurts another before the Lord Justice or his deputes, or within the outer Tolbooth, while the Lords of Session are sitting for the administration of justice, he shall incur the pain of death; and if any person strikes or hurts another before any inferior judge, while sitting in judgment, he shall be punished by fine and imprisonment. The Act 1600, c. 4, makes it a capital offence to invade or pursue any of "His Highness's Session," it being doubtful, however, whether this phrase refers to the Lords of Session or of the Privy Council.[7] The Act 7 Anne,

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[1] 10 & 11 Geo. V. c. 43. The Pistols Act, 1903, is repealed, s. 19.
[2] 46 & 47 Vict. c. 3.
[3] *Ibid.*, s. 13.
[4] Macdonald, p. 118; Anderson, p. 172.
[5] 46 & 47 Vict. c. 3.
[6] *H.M. Adv.* v. *Costello*, 1882, 4 Coup. 602.
[7] Hume, i. 405.

c. 21, which assimilated the treason law of Scotland to that of England, makes it treason to kill any of the Lords of Session or Justiciary while sitting in judgment. Minor insults or threats offered to a judge in his judicial capacity, whether he is sitting in Court or not, may be dealt with at common law, and punished by an arbitrary sentence.

221. To slander or "murmur" a judge is made an offence by the Act 1540, c. 104.[1] It is also a crime at common law.[2] Such an offence is punishable by fine and imprisonment.[3] The judge against whom the offence has been committed may summarily convict and punish the offender.

Subsection (2).—*Malversation.*[4]

222. Malversation is misconduct in office, *e.g.* oppression or partiality by judges, or the receiving of bribes.[5] The punishment is imprisonment or fine, to which may be added deprivation of office and infamy.

Subsection (3).—*Bribery.*[6]

223. The offence of bribery consists in the taking a reward by a person, or the giving or offering a reward to a person, to influence his behaviour in his office. Bribery is criminal when a person influenced, or attempted to be influenced, occupies a responsible public office, and the object of the bribery is to influence him in his official capacity.

(i) *Of Judges.*

224. The offence of taking bribes by the judges of the Court of Session was dealt with by the Act 1579, c. 93, which enacted "that nane of the Lordes of Session alreddie received, or to be received, nouther be themselves, or be their wives, or servands, take in ony times cumming bud, bribes, gudes or geir, fra quhatsumever person or persones presently havand, or that hereafter sall happen to have ony actions or causes persewed before them, outher fra the persewer or defender, under the pain of confiscation of all their movabil gudis, that dois in the contrair, the ane half thereof to be applied to our Sovereign Lord, and the uther halfe to the reveiler and tryer of the saidis bud-takeris. And further decernis and ordainis the saidis bud-takeris to be displaced and deprived *simpliciter* of their offices, quhilk they beare in the College of Justice, and to be declared infamous, and als to be punished in their persones at the King's Majesties will." Judges of the Court of Session now

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[1] *H.M. Adv.* v. *Porteous*, 1832, 4 Sc. Jur. 384; this Act is not in desuetude.

[2] Hume, i. 406; Alison, i. 575; Ersk. iv. 4, 32.

[3] *Carr*, 1854, 1 Irv. 464; *H.M. Adv.* v. *Robertson*, 1870, 42 Sc. Jur. 356; 1 Coup. 404.

[4] Hume, i. 407; Stair, i. 6, 25; Macdonald, p. 213; and see *H.M. Adv.* v. *Dick*, 1901, 3 F. (J.) 59; 3 Adam 344.

[5] See para. 223, *infra*.

[6] Hume, i. 470; Bankton, ii. 480; Macdonald, p. 213; Anderson, p. 78. The Prevention of Corruption Act, 1906 (6 Edw. VII. c. 34), which deals with bribery in commercial matters, is treated in para. 344, *infra*.

hold office *ad vitam aut culpam*, and cannot be removed by the Crown. It is thought, therefore, that impeachment in Parliament is the proper mode of dealing with an act of malversation by a Supreme Court judge.[1]

225. The offence of bribe-taking by inferior judges is dealt with by the Acts 1424, c. 45; 1427, c. 107; 1449, c. 17; 1457, c. 76; 1469, c. 26; 1540, c. 104. These statutes either make particular mention of bribery or deal generally with malversation or corruption on the part of judges. They "appear to have passed, like those on many other subjects, without much regard to their consistency with each other; and, on a review of the whole series, the result seems to be that bribery is subject to a discretionary censure, including, among other penalties, the loss of fame and office, besides payment of the party's costs, and reparation of his damage." [2] Merely to solicit a bribe is not criminal.[3] It is necessary that the accused be a judge at the time when the alleged bribe took place; it is not enough if he received the money prior to his appointment.[3]

226. To give or offer a bribe to a judge is a serious offence at common law, and would render the offender liable to an arbitrary sentence of a severe character.

(ii) *Of other Public Officials.*

227. It is a common law offence for public officials to take bribes to influence their public conduct. It is a similar offence to give or offer a bribe, with the like object, to a public official. Thus for an inferior officer of Court, such as a clerk or a macer, to take a bribe, or for any one to give or offer a bribe to such official, is an offence cognisable at common law. It is a common law offence to bribe a parliamentary voter [4] or to attempt to bribe an officer of the revenue.[5]

228. In certain departments of the public service the offence of bribery is dealt with by statutory enactment. Thus the Act 7 & 8 Geo. IV. c. 53, s. 12, provides that officials employed in the Excise, who shall take money or reward, or enter into any collusive agreement contrary to their duty, shall be subject to a fine of £500 for every such offence, and, on conviction thereof, shall thereby be rendered incapable of thereafter serving the Crown in any office or employment whatsoever. The same section provides that every person offering such reward, or proposing such agreement to an Excise official, shall, for each offence, be liable to a fine of £500. By the Customs Laws Consolidation Act of 1876,[6] it is provided that if any officer of Customs, or other person duly employed for the prevention of smuggling, shall take any bribe, gratuity, recompense, or reward for the neglect or non-performance of his duty, every such officer, or other person, shall forfeit for every such offence the sum of £500, and be rendered incapable of serving His

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[1] *Stirling & Sons* v. *Holm*, 1873, 11 M. 480, per Lord Deas; Mackay, Practice, i. 100.
[2] Hume, i. 407.
[3] *H.M. Adv.* v. *Dick*, 3 F. (J.) 59; 3 Adam 344.
[4] *Mackintosh*, 1786, Hume, i. 408.
[5] *Stein*, 1786, Hume, i. 408.
[6] 39 & 40 Vict. c. 36, s. 217.

Majesty in any office, either civil, naval, or military. By the same section it is provided that "every person who shall give, or offer, or promise to give or procure to be given, any bribe, recompense, or reward to, or shall make any collusive agreement with, any such officer or person as aforesaid, to induce him in any way to neglect his duty, or to do, conceal, or connive at any act whereby any of the provisions of any Act of Parliament relating to the Customs may be evaded, shall forfeit the sum of £200."

229. In 1889 the Public Bodies Corrupt Practices Act [1] was passed "for the more effectual prevention and punishment of bribery and corruption of and by members, officers, or servants of Corporations, Councils, Boards, Commissions, or other public bodies." By this statute it is provided (ss. 1 and 2) that any person who by himself, or with another, corruptly solicits, receives, or agrees to receive for himself or another, any gift, loan, fee, reward, or advantage as an inducement to, or reward for, or otherwise on account of, any member, officer, or servant of a public body doing, or forbearing to do, anything in respect of any matter or transaction, actual or proposed, in which such public body is concerned, or corruptly gives, promises, or offers any gift, etc., to any person, whether for his or another's benefit, as an inducement to, or reward for, or otherwise on account of any member, officer, etc., doing, or forbearing from doing, anything in respect of any matter or transaction, actual or proposed, in which such public body is concerned, is liable to fine and imprisonment, not exceeding two years, with or without hard labour, and to other penalties specified in the Act. The statute defines (s. 7) "public body" as meaning "any council of a county, or county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under, and for the purposes of any Act relating to local government, or the public health, or to poor law or otherwise to administer money raised by rates in pursuance of any general Act, but does not include any public body, as above defined, existing elsewhere than in the United Kingdom." In the same section "advantage" is defined to include "any office or dignity, and any forbearance to demand any money or money's worth or valuable thing, and includes any aid, vote, consent, or influence, and also includes any promise, or procurement of, or agreement, or endeavour to procure, or the holding out of any expectation of any gift, loan, fee, reward, or advantage, as above defined."

Subsection (4).—*Perjury.*

(i) *Definition and Requisites.*

230. Perjury is the judicial affirmation of falsehood upon oath. The term oath includes an affirmation recognised as equivalent to an oath.[2]

[1] 52 & 53 Vict. c. 69.

[2] Hume, i. 366; Alison, i. 465; Macdonald, p. 214; Anderson, p. 88.

The institutional writers treat of perjury as an offence against the course of justice. It is apparently on this principle that the crime can only be committed in civil or criminal proceedings possessing a properly judicial character. A formal appeal to the Deity, or affirmation equivalent thereto, emitted before a judge competent to receive it and in due form, is essential to the crime.[1] A technical informality in the trial in which the alleged perjury is committed, will not elide the charge;[2] but due attention must be given to the safeguards required by law. It is a question of fact whether the proceedings were sufficiently solemn to support a charge of perjury.[3] Perjury may be committed in a reference to oath. Although Hume[4] appears to treat the point as open, it seems settled that perjury cannot be committed in proceedings before an Ecclesiastical Court.[5] Professor More[6] indicates an opinion that where civil proceedings are being investigated by an Ecclesiastical Court, a charge of perjury in respect of falsehood would lie. Falsehood in affidavits required by law, more especially where forming part of judicial proceedings, has been prosecuted as perjury at common law. The majority of statutes, however, prescribing such affidavits, make special provision for falsehood therein inferring the pains of perjury or special pains and penalties.[7]

231. To infer perjury, the falsehood must be (*a*) explicit;[8] that is to say absolutely irreconcilable with truth. Mere omission is not sufficient. (*b*) It must be made wilfully and corruptly in the knowledge of the truth. If the untrue statements can be reasonably attributed to an erroneous view of the facts, or to defective recollection, the accused will be entitled to the benefit of this; but an oath of *non memini* or *nihil novi* will not protect a witness if the events were so recent or the circumstances such that he could not fail to be aware of them. As Hume points out, there is no absolute distinction between oaths of opinion or credulity and other oaths, but the difficulty lies in obtaining proof of the corrupt *animus* in such cases. It is only in very exceptional circumstances that such an oath could be made the foundation of a charge of perjury. A prosecution for perjury will not lie in respect of the breach of promissory oaths such as those of allegiance, as this may

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[1] *M'Lachlan*, 1837, 1 Swin. 528; Bell's Notes, 94; see also *Barr*, 1839, 2 Swin. 282—held that the taking falsely the oath prescribed by the Reform Act, 1832, Sched. I., although not perjury in respect of there being no appeal to the Deity, was an indictable offence at common law. This case contains an exhaustive examination of the principles applicable to the crime of perjury. See more especially the Information for the Pannel, pp. 294–310.

[2] *H.M. Adv.* v. *Richardson*, 1872, 2 Coup. 321; 10 S.L.R. 15.

[3] *Hastie*, 1863, 4 Irv. 389, where the judge was absent during part of the proceedings.

[4] i. 370.

[5] Alison, i. 471; Macdonald, p. 215.

[6] ii. 409; see also Ersk. Prin., 21st ed., p. 752.

[7] Hume, i. 374; Alison, i. 471; Bell's Notes, 95–6.

[8] Hume, i. 366 *et seq.*; Alison, i. 465; More, ii. 408–9; Macdonald, p. 214; *Bole* v. *Stevenson*, 1883, 11 R. (J.) 10; 5 Coup. 350. The true state of facts must be set out in the indictment. *Sanderson* v. *Hart*, 1899, 1 F. (J.) 87; 3 Adam 25; but see *Roberts* v. *Henderson*, 1882, 10 R. (J.) 5; 5 Coup. 118. A complaint under the Summary Jurisdiction Act, 1908, may be in the brief form prescribed by the Act. *Strathern* v. *Burns*, 1921, J.C. 92.

be attributed rather to forgetfulness subsequent to the oath, than to falsehood at the time when it was emitted.[1] (*c*) It must be material to the issue. This naturally follows from the principle of the crime being against the course of justice, as only falsehoods on material points are calculated to affect the interests involved. The possibility of innocent mistake on immaterial details is also a ground for the distinction between facts material and immaterial. To what facts these characteristics apply will be a question of circumstances in each case, but facts affecting the qualification, credit, and credibility of witnesses have been held material.[2]

(ii) *Proof of Perjury.*

232. It is very desirable that where perjury is suspected the evidence of the witness should be formally reduced to writing, read over to and signed by him. In proceedings where a written deposition is essential, such deposition would be the only competent method of proving the tenor of the oath; but in proceedings where a record of the evidence does not require to be kept, parole evidence is admissible. Where perjury is alleged to have been committed in proceedings in the inferior Court, the judge of that Court is a competent witness, and he may refer to notes of evidence made by him at the time.[3] It rather appears that a judge of the Supreme Court is not a competent witness in similar circumstances.[4] The falsehood of the oath and the knowledge of that falsehood by the witness may be proved *prout de jure*, even although such evidence implies guilt of a crime in which an acquittal has been obtained.[5] In *Bauchop* [6] it was held competent to prove by parole the terms of an oath by the pannel as a witness in the Small Debt Court three years previous to the trial, for the purpose of supporting a charge of perjury in respect of a deposition subsequently emitted by him. The prosecutor must be prepared to prove the true state of the facts: it is not sufficient to found on two contradictory oaths, and allege that one or other is false.[7]

(iii) *Punishment.*

233. Hume [8] gives instances of capital punishment following on convictions of perjury; and under the old Statutes 1540, c. 80; 1551, c. 19 and 22; 1555, c. 47, severe corporal pains, such as dismembering the hand or tongue and piercing the tongue, as well as banishment, escheat of moveables, etc., were authorised. For many years the punishment has been confined to penal servitude or imprisonment. It was for long the invariable practice to include in the sentence a declaration that the pannel was to be "infamous and incapable

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[1] Hume, *passim*; Alison, *passim*.
[2] Macdonald, p. 216; *Brown*, 1843, 1 Broun 525.
[3] *Monaghan*, 1844, 2 Broun 82 and 131.
[4] *Wilson*, 1834, Bell's Notes, 99; *Monaghan*, *supra*, at p. 136.
[5] *Walker*, 1838, 2 Swin. 69, especially at p. 86. [6] 1840, 2 Swin. 513.
[7] Hume, i. 372, 375–377; Alison, 476–482; Macdonald, p. 214. [8] i. 378.

of holding any public trust or office, or of passing upon any inquest or assize, or of giving evidence in any Court of Justice in all time coming." The clause relating to giving evidence was omitted after the passing of the Evidence Act, 1852,[1] as being inconsistent with the terms of that Act, which provided (s. 1) that no person adduced as a witness "shall be excluded from giving evidence by reason of having been convicted of, or having suffered punishment for, crime;"[2] and opinions were expressed by L. J.-C. Moncreiff, in the case of *Marr*,[3] in favour of the declaration of infamy being omitted in the majority of cases. The Court of Session has jurisdiction summarily to try perjury occurring in proceedings before that Court,[4] but in modern practice the crime is dealt with in the criminal Courts. The Sheriff has jurisdiction in cases of perjury.[5] Indeed such cases are now generally tried in the Sheriff Court, and in exceptional circumstances have, with the authority of Crown counsel, been tried summarily. Prior to the cases of *Marr*,[3] and *Roberts*,[5] it appears to have been not uncommon in the Sheriff Court to add the declaration of infamy to sentences in perjury;[6] but having regard to the opinions expressed in these cases, it appears settled that this declaration is incompetent in the Sheriff Court.

It is competent to charge several panels in the same indictment with perjury where the crime relates to the same matter, and is alleged to have been committed to compass the same defeat of justice.[3]

Subsection (5).—*Prevarication upon Oath.*

234. This consists in the witness not uttering direct falsehoods, but attempting to mislead the Court by "an artful tricking oath," inconsistent and contradictory in itself. As a gross contempt of Court and of the sanctity of an oath, it may be immediately punished by the presiding judge.[7] It is unnecessary in the High Court and in the Sheriff Court to set forth in the warrant of commitment the particulars of the prevarication.[8] In Police Courts, details of the prevarication are frequently matter of statutory requirement.[9]

Subsection (6).—*Subornation of Perjury.*

235. This offence consists in inducing others to give false testimony.[10] It is immaterial by what means or inducement the false evidence

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[1] 15 Vict. c. 27.

[2] *Maxwell*, 1865, 5 Irv. 65.

[3] *Marr* v. *Procurator-Fiscal of Midlothian*, 1881, 8 R. (J.) 21; 4 Coup. 407.

[4] Hume, i. 379.

[5] *Roberts* v. *Henderson*, 1882, 10 R. (J.) 5; 5 Coup. 118. This case contains observations as to the effect on a charge of perjury of the evidence in the Sheriff Court not being dictated. Hume, i. 377; Alison, i. 482.

[6] Criminal Procedure (Scotland) Act, 1887, Sched. A.; see also *Bole* v. *Stevenson*, 1882, 11 R. (J.) 10; 5 Coup. 350.

[7] Hume, i. 380; Alison, i. 484; Macdonald, pp. 273, 461.

[8] *Macleod* v. *Speirs*, 1884, 11 R. (J.) 26; 5 Coup. 387. Lord Young dissented strongly from the decision of the Court.

[9] *Blake* v. *Macdonald*, 1890, 2 White 477.

[10] Hume, i. 381 Alison, i. 486; Macdonald, p. 217; Anderson, p. 91; see *M'Daniel*, 1876, 3 Coup. 271.

is procured. Even if the facts spoken to are actually true, yet if the deponer knows not the truth of them, there is enough to constitute this crime. The crime is complete only if the witness actually swears to the falsehood, but attempt is a relevant charge both at common law and under s. 61 of the Criminal Procedure Act, 1887. The criminal attempt is committed as soon as the corrupt inducement has been offered to the witness. The punishment is penal servitude or imprisonment; and if the crime has been completed, the sentence, in the High Court, may include a declaration of infamy.

Subsection (7).—*Practices to Procure False Evidence or to Prejudice a Fair Trial.*

236. Such practices, although they may not amount to subornation, are punishable.[1] Hume and Alison cite cases prosecuted under this category in respect of the destruction or suppression of evidence, soliciting parties to concur in false or malicious prosecution, and publications calculated to affect the mind of the public and prevent a fair trial.

Subsection (8).—*Deforcement.*[2]

237. Deforcement is the crime of forcibly preventing an officer of the law or his assistants from executing the legal warrant of a competent Court. The resistance offered to the officer must be forcible. Any sort of actual violence, or the shew of violence, is sufficient, if the officer is thereby alarmed, and so prevented from doing his duty. It is not necessary that there should be any actual assault on the officer.[3] He may be inveigled into a room, and the door locked upon him. Or he may be prevented from effecting a capture by the friends of the person proposed to be arrested surrounding him, and so keeping the officer at a distance. Or, again, a rescue may be effected after the officer has made an arrest. It is even deforcement if the officer cannot effect an arrest owing to efforts of resistance—however passive these may be—made by the person whom he wishes to arrest. The alarm of the officer, however, must be reasonable. The violence, or shew of violence, offered must be such as would overcome the constancy of a man of ordinary courage and presence of mind.[4] The force used towards the officer must have reference to the duty which he is in course of discharging, and must be designed to prevent the accomplishment of his object. There must be actual prevention of the diligence being carried out. If the officer persists, in spite of the resistance which is offered to him, and accomplishes his object, there is no deforcement,[5] however much injury has been inflicted upon the officer. The offender,

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[1] Hume, i. 383–385; Alison, i. 488.

[2] Hume, i. 396; Alison, i. 505; Macdonald, p. 218; Anderson, p. 79; Stair, i. 9, 29; iv. 49; Ersk. Inst. iv. 4, 32.

[3] *Hunter*, 1860, 3 Irv. 518; *H.M. Adv.* v. *Nicolson*, 1887, 1 White 307, at p. 315.

[4] *H.M. Adv.* v. *Nicolson, supra.* [5] *Hunter, supra*, at p. 526.

in such circumstances, can be prosecuted only for attempt to deforce, or for aggravated assault. If, on the other hand, the officer has been prevented from carrying out his object, the offender cannot, by repentance or restitution, absolve himself from the guilt of deforcement.[1]

238. The officer and his assistants must be duly qualified. His appointment or commission as an officer of the law must have been completed, and must be existing and in force at the moment of deforcement. There can be no deforcement of private individuals who, without warrant, take it upon themselves to act as officers of the law. It is even doubtful whether a private individual to whom, in urgent circumstances, a warrant has been issued, becomes an officer of the law, to the effect of being capable of deforcement.[2] Moreover, the officer must be carrying out his lawful duty. It is not deforcement if an attack is made upon the officer before he has reached the place where he is to perform his duty, and before he has begun to do so, or to make preparations for doing so. Nor is it deforcement to attack him on his return after his duty has been done or, after having attempted to do it, he has desisted. But it is deforcement if the officer is engaged in the performance of his duty, or is making preparations to do so, and is by force prevented from carrying out his purpose.[3]

239. The officer must perform his duty in a lawful manner. He must, at the outset, notify to those who are to be affected by the diligence, that he is an officer of the law. The best notification is to display his blazon or baton, to state his errand, and, if called upon to do so, to shew his warrant. If the parties concerned know him to be an officer, he need not display his blazon. Nor need he shew his warrant unless this is asked, the presumption being that the parties knew of the existence and nature of the warrant, if they did not make a demand to see it. If an officer is asked to shew his warrant and refuses to comply, it is not deforcement if he is then resisted. In no case, however, is the officer bound to part with the warrant. It is not essential to the crime that the officer should have the principal warrant in his possession, if the accused knows that the officer is an officer of the law engaged in execution of his duty in serving the warrant.[4] He is not bound even to shew it after the diligence has been completed, if the party concerned has submitted to the execution without demur. No warrant is required by revenue officers in performing their ordinary duties, and it is therefore no defence to a charge of deforcing revenue officers, to assert that they had no warrant.[5] But where revenue officers are performing duties outside their ordinary sphere, they require a warrant.[6] The officer, in executing his commission, must observe all the solemnities which are prescribed by law. He is not entitled to execute letters of caption on a

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[1] Hume, i. 395.

[2] Hume, i. 387.

[3] *H.M. Adv.* v. *M'Lean*, 1886, 14 R. (J.) 1; 1 White 232, per Lord Mure; *H.M. Adv.* v. *Nicolson*, 1887, 1 White 307, at p. 315.

[4] *Cunningham* v. *Wilson*, 1901, 3 F. (J.) 65; 3 Adam 243.

[5] *Hamilton*, 1845, 2 Broun 495.

[6] *Stewart* (*Cook*), 1856, 2 Irv. 416.

Sunday, or after he has seen a sist or suspension of the letters. Nor may he lawfully poind goods at night, nor break open doors to poind without letters of open doors. If, in these circumstances, he is resisted, there is no deforcement. It is, however, no defence to a charge of deforcement, that the officer has violated a usage which is merely local.[1] Offer to pay the debt due will not justify resistance to the officer, unless he was authorised to receive payment. But the production of a discharge applicable to the diligence will afford a valid defence, if the officer has disregarded the discharge.

240. The writs of every Court of Law which require to be served are protected by the pains of deforcement.[2] But the warrant must be such as may be lawfully issued from the judicatory and must be substantially regular.[3] The offence is dealt with, according to circumstances, either by the High Court of Justiciary or in a summary Court.[4] As a rule the Crown prosecutes in cases of deforcement, as in other crimes. But the prosecution may be at the instance of the employer of the officer who has been deforced or of the officer himself and the Lord Lyon, in which case the concurrence of the employer of the officer is unnecessary.

241. The penalties of deforcement were formerly matter of statutory enactment. The Act 1581, c. 118, provided that those convicted of deforcement should be punished by escheat of moveables, the creditor being preferable for his debt, expenses, and damages. The Act 1587, c. 85, enacted that persons guilty of deforcement should be prosecuted either civilly or criminally, at the option of the pursuer, and that their lives and goods should be at the King's will. The Act 1592, c. 152, makes the punishment of deforcement forfeiture of moveables, one-half to the King, the other half to the pursuer. The punishment of deforcement is now fine or imprisonment, or both.

Subsection (9).—*Prison-breaking.*[5]

242. If a prisoner, who is confined lawfully and on warrant in a public gaol, escape, he is guilty of the crime of prison-breaking. If the prisoner be merely placed in gaol by a constable for security, and he escape therefrom, this does not amount to prison-breaking;[6] nor is the crime committed if the warrant on which he is confined is palpably informal, or is not applicable to him. If the warrant be in itself formal, irregularity in the proceedings of which it is the result is of no consequence. The gaol must be a proper public gaol, and not merely a lock-up or temporary place of detention. Escape from any part of the precincts of the gaol (*e.g.* from the exercise-yard[7]) is equally prison-

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[1] *Davidson*, 1821, Shaw (Just.) 41.
[2] *H.M. Adv.* v. *M'Lean*, 1886, 14 R. (J.) 1; 1 White 232.
[3] *M'Lean*, 1838, 2 Swin. 185; Bell's Notes, 103; *Crawford*, 1838, 2 Swin. 200, at p. 208; Bell's Notes, 103.
[4] *Matheson* v. *Ross*, 1885, 12 R. (J.) 40.
[5] Hume, i. 401 *et seq.*; Macdonald, p. 224; Anderson, p. 84; Alison, i. 555; More, ii. 401.
[6] Hume, *ibid.*
[7] *Otto*, 1833, Bell's Notes, 104.

breaking: but it is not prison-breaking to force a passage from one part of the prison to another. The mode in which the escape is effected is of no consequence.[1] The punishment is either imprisonment or penal servitude. The attempt to break prison is of itself an offence.[2]

Subsection (10).—*Rescue of a Prisoner.*

243. At common law it is a crime to rescue or attempt to rescue prisoners who are in lawful custody.[3] By the Act 16 Geo. II. c. 31, it is criminal to aid or assist prisoners to attempt to escape out of lawful custody. By this statute it is provided that any person aiding or assisting in the escape from jail of any prisoner convicted of treason, or any felony, except petty larceny, shall be guilty of felony, and liable to penal servitude for seven years; and if such prisoner was in jail convicted of petty larceny, or any other crime, not being treason or felony, any person aiding or assisting him to escape shall be guilty of a misdemeanour, and liable to punishment by fine and imprisonment (s. 1). Any person conveying any disguise, instrument, or arms to help the escape of a prisoner convicted of treason or felony, shall be guilty of felony, and liable to penal servitude for seven years; and if such prisoner was confined for any less crime, the offence shall be a misdemeanour, punishable by fine and imprisonment (s. 2). Any person assisting a prisoner, charged with treason or felony, to escape from a constable or other lawful officer, shall be guilty of felony, and liable to penal servitude for seven years (s. 3). Prosecutions for these offences must be commenced within one year after the offence has been committed (s. 4).

Certain acts penalise the rescuing of convicted murderers, prisoners, etc.[4] Assaulting a constable with intent to rescue, or to prevent the arrest of, some person charged with crime is itself criminal.[5]

Section 5.—Crimes connected with the Revenue.

Subsection (1).—*Coining.*[6]

244. By the old customary law of Scotland, coining offences were punished capitally. Frequently, but not invariably, such offences were prosecuted as treason. Crimes relating to the coinage were also dealt with by the Acts 1449, c. 29; 1469, c. 40; 1540, c. 99; 1540, c. 124; 1563, c. 70; and 1696, c. 42. The last-mentioned statute was passed to remove doubts as to what was the proper penalty for clipping foreign money, and vending it as good after it had been clipped. The Act

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[1] *Bryan*, 1841, 2 Swin. 545; *Hutton*, 1837, 1 Swin. 497; *M'Queen*, 1840, Bell's Notes, 181.

[2] *Gallie*, 1832, 5 Deas & And. 242; *Smith*, 1863, 4 Irv. 434; Criminal Procedure Act, 1887, s. 61.

[3] Hume, i. 404; Macdonald, p. 224; Anderson, p. 85; *Urquhart*, 1844, 2 Broun 13.

[4] 25 Geo. II. c. 37, s. 9; 1 & 2 Geo. IV. c. 88, s. 1; 5 Geo. IV. c. 84, ss. 22, 23; 7 Will. IV. and 1 Vict. c. 91, s. 1. As to reformatories, etc., see 8 Edw. VII. c. 59, s. 2, and 8 Edw. VII. c. 67, s. 72.

[5] 1 & 2 Geo. IV. c. 88, s. 2.

[6] Hume, i. 561; Alison, i. 451; Ersk. iv. 4, 22; Macdonald, p. 101; Anderson, p. 207.

made this a capital offence, but it at the same time declared that coining offences were no longer to be punished as treason. The Act 7 Anne. c. 21, which extended to Scotland the treason laws of England, again raised all high offences against the coin to the rank of treason. But by the law of England only the graver coining offences were treasonable. Less heinous offences against the coin—such as coining copper money, uttering false British coin, coining or lightening foreign money —were not treasonable under English law; and so, in Scotland, offences such as these were punished by an arbitrary sentence.

245. In 1861 an Act [1] was passed to consolidate and amend the statute law of the United Kingdom against offences relating to the coin, and prosecutions against coiners now proceed under this Act.

The statute distinguishes two degrees of crime, namely: (1) Crimes and offences, and (2) high crimes and offences. The former are punishable by various penalties ranging from six months' imprisonment, with or without hard labour, to penal servitude not exceeding three years. The latter are punishable by imprisonment for two years or by various periods of penal servitude up to a life sentence.

246. The following are the various classes of crimes and offences and the punishments appropriated to each:—

(i) First offence of knowingly uttering base foreign gold or silver coin (s. 20).

Punishment.—Six months' imprisonment, with or without hard labour.

(ii) (1) First offence of knowingly uttering base British gold or silver coin (s. 9). (2) Uttering as British gold or silver coin, any coin, medal, etc., which is of less value than the coin it is passed off for (s. 13). (3) Uttering base British copper coin (s. 15). (4) Having three or more base British copper coins, with intent to utter (s. 15). (5) Defacing any British current coin by stamping names or words upon it (s. 16). (6) First offence of making base inferior coin (s. 22).

Punishment.—One year's imprisonment, with or without hard labour, or solitary confinement.

(iii) (1) Exporting any counterfeit British current coin without lawful authority (s. 8). (2) Uttering base British coin, and either (*a*) having in possession any other counterfeit British current gold or silver coin, or (*b*) on the same day, or within ten days next ensuing, committing another offence of uttering base British coin (s. 10). (3) A second uttering of base foreign gold or silver coin (s. 21).

Punishment.—Two years' imprisonment, with or without hard labour, or solitary confinement.

(iv) Knowingly possessing three or more base British gold or silver coins, with intent to utter them (s. 11).

Punishment.—Three years' penal servitude,[2] or two years' imprisonment, with or without hard labour, or solitary confinement.

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[1] 24 & 25 Vict. c. 99.

[2] Macdonald, p. 104.

247. The following are high crimes and offences:—

(i) (1) Unlawfully possessing gold or silver taken from British coin (s. 5). (2) Making base British copper coin (s. 14). (3) Making, mending, buying, selling, or having in one's custody or possession instruments for counterfeiting British copper coin (s. 14). (4) Dealing in base British copper coin (s. 14). (5) Making base foreign gold or silver coin (s. 18). (6) Unlawfully bringing into Britain base foreign gold or silver coin (s. 19). (7) Second offence of making base foreign inferior coin (s. 22).

Punishment.—Seven years' penal servitude,[1] or two years' imprisonment, with or without hard labour, or solitary confinement.

(ii) Lightening British current gold or silver coin, with intent that it may thereafter pass for British current coin (s. 4).

Punishment.—Fourteen years' penal servitude, or two years' imprisonment, with or without hard labour, or solitary confinement.

(iii) (1) Making base British gold or silver coin (s. 2). (2) Gilding or silvering base British coin, or pieces of metal, with intent to coin the same into counterfeit coin (s. 3). (3) Gilding or colouring British current silver coin, with intent to make it pass for British current gold coin (s. 3). (4) Gilding or silvering or colouring British current copper coin, with intent to make it pass for British current gold or silver coin (s. 3). (5) Dealing in base British gold or silver coin (s. 6). (6) Unlawfully importing base British gold or silver coin (s. 7). (7) An offence of (*a*) uttering base British gold or silver coin; or (*b*) uttering base British gold or silver coin, aggravated by possession of another base coin, or by committing a similar offence within ten days; or (*c*) possessing three or more base British gold or silver coins, by a person previously convicted of any of these offences, or of any high crime and offence under this or any previous Act relating to the coin (s. 12).[2] (8) A third offence of uttering base foreign gold or silver coin (s. 21). (9) Making or mending, or beginning or proceeding to make or mend, or buying or selling, or having in one's custody or possession, instruments for cutting or stamping British or foreign gold or silver coin (s. 24). (10) Unlawfully conveying instruments or metals from any Royal mint (s. 25).

Punishment.—Penal servitude for life, or two years' imprisonment, with or without hard labour, or solitary confinement.

248. As regards British coin, the following definitions apply (s. 1):—"Current gold or silver coin" includes any such coin coined in any Royal mint or lawfully current in any part of the King's dominions. "Copper coin" includes any copper coin and any coin of bronzed or mixed metal coined or current as above. "Current coin" includes any coin coined in a Royal mint or lawfully current by proclamation in any of the King's dominions. "False or counterfeit coin" includes current

[1] Macdonald, p. 104.

[2] Macdonald, p. 107, note 1, and cases there cited; and see *H.M. Adv.* v. *Bryson*, 1871, 2 Coup. 26.

coin tampered with so as to resemble any current coin of a higher denomination. "Having in custody or possession" includes knowingly having in the possession of another, or in any place, whether belonging to or occupied by the person accused or not, or whether he have the thing for his own use or that of another.[1]

249. Sec. 30 provides that "every offence of falsely making or counterfeiting any coin, or of buying, selling, receiving, paying, tendering, uttering, or putting off, or of offering to buy, sell, receive, pay, utter, or put off, any false or counterfeit coin, against the provisions of this Act, shall be deemed to be complete, although the coin so made or counterfeited, or bought, sold, received, paid, tendered, uttered, or put off, or offered to be bought, sold, received, paid, uttered, or put off, shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected." [2]

250. The statute does not require that a counterfeit coin shall be uttered as genuine.[3] The repeated tendering of the same coin does not amount to the aggravation of repeated uttering in the sense of s. 10 of the Act. The coin uttered on the second occasion must be different from that uttered on the first.[4] A charge of possession of coins cannot be made under the Act if a charge of uttering the same coins has also been made.[5] If a person is accused of two separate acts, one a crime and offence, the other a high crime and offence under the Act, they may be charged cumulatively.[6] But it is thought that if a person is charged cumulatively with a crime and offence and a high crime and offence where only one act of contravention of the Act has taken place, the charge is a bad one.[7]

Subsection (2).—*Smuggling.*[8]

251. Smuggling is the offence of making, importing, or exporting goods without paying Government duties, and with the intention of defrauding the revenue. If smuggled goods are sold in this country, no action lies for recovery of the price, provided that the seller knew that the goods sold had been smuggled. A foreign seller may recover the price of goods sold by him and smuggled into this country if he has not been accessory to the smuggling. Offences against the revenue have been dealt with by a long series of statutes.[9]

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[1] Cf. *Murray*, 1841, 2 Swin. 559; *Sutherland*, 1848, J. Shaw 135.

[2] This section prevents the raising of such questions as arose in *Logg*, 1839, 2 Swin. 280.

[3] See *Brown*, 1833, Bell's Notes, 131; *Mooney*, 1851, J. Shaw 509; Macdonald, p. 108.

[4] *Anderson* v. *Blair*, 1861, 4 Irv. 5.

[5] *Weir and Hull*, 1864, 4 Irv. 495.

[6] *Davidson*, 1863, 4 Irv. 292; *Wilsons*, 1866, 5 Irv. 302; 2 S.L.R. 274.

[7] Macdonald, 109; see *Forbes*, 1835, Bell's Notes, 133; *Brown*, 1837, *ibid.*; *Robertson*, 1837, *ibid.*; *M'Adam*, 1847, Ark. 326; *Watson*, 1858, 3 Irv. 306; *H.M. Adv.* v. *Mullens*, 1886, 1 White 306.

[8] Ersk. iii. 3, 3; Stair, ii. 2, 9; Macdonald, p. 240; Anderson, p. 127.

[9] See 6 Geo. I. c. 21; 8 Geo. I. c. 18; 19 Geo. II. c. 34; 39 & 40 Vict. c. 36; 42 & 43 Vict. c. 21; 44 & 45 Vict. c. 12.

252. The Customs Laws Consolidation Act of 1876 [1] contains various provisions dealing with smuggling offences. By section 172 it is provided that vessels made use of in removal of uncustomed or prohibited goods shall be forfeited, and the owners and masters of such vessels shall each be liable in a penalty equal to the value of such vessel or boat, not in any case exceeding £500. Goods unshipped without payment of duty, and prohibited goods, goods illegally removed from warehouses without payment of duty, prohibited goods shipped or water-borne with intent to be exported, goods subject to duty concealed on board ship, and also goods used to conceal them, are all liable to forfeiture (s. 177). Sec. 179 [2] deals with vessels or boats arriving within the United Kingdom or the Channel Isles, or within three leagues thereof, having prohibited goods on board or attached thereto. Ships belonging to His Majesty's subjects from which, during a chase by a revenue boat, goods are thrown overboard, are liable to forfeiture (s. 180).

253. Ships not bringing to when required to do so by a revenue boat, or by one of His Majesty's ships, are liable to a penalty of £20, and also to be fired into (s. 181). Ships and persons may be searched in port by officers of customs, but any person before being searched may require to be taken before a justice or superior officer of customs (ss. 182–185). Every person guilty of illegally importing, unshipping, removing from quay or wharf, carrying into or removing from warehouse without authority, harbouring or concealing, carrying or removing contraband goods, or who in any other way shall be guilty of fraudulent evasion of any duties of customs, shall, for each such offence, forfeit either treble the value of the goods, including the duty payable thereon, or £100, at the election of the Commissioners of Customs; and the offender may either be detained or proceeded against by summons (s. 186). Every person who shall rescue or attempt to rescue goods seized by officers of customs, or persons apprehended for a revenue offence, or who shall assault, obstruct, or resist revenue officers in the execution of their duties, shall, for each such offence, forfeit a penalty of £100 (s. 187). Persons to the number of three or more assembling to run goods are liable to a penalty not exceeding £500 and not less than £100 (s. 188). Procuring or hiring persons to run goods is an offence punishable with imprisonment for any term not exceeding twelve months (s. 189). Committing revenue offences, armed or disguised, or, being armed or disguised, being found with contraband goods within five miles of the sea coast or any tidal river, entails a liability to imprisonment, with or without hard labour, for any term not exceeding three years. Persons signalling smuggling vessels may be detained and forfeit £100, or be kept to hard labour for one year (s. 190). Persons shooting at boats belonging to the Navy or revenue service are guilty of felony (s. 193). Persons cutting adrift vessels belonging to the customs shall, for every such offence, forfeit the sum of £10 (s. 195).

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[1] 39 & 40 Vict. c. 36. [2] Amended 53 & 54 Vict. c. 56.

254. As to the course of procedure for recovering penalties, enforcing forfeitures, and punishing offenders under the Customs Acts, see sections 218–245 and 247–263 of the above-mentioned statute. By the Customs and Inland Revenue Act, 1879,[1] it is provided (s. 12) that persons who have been previously convicted of any offence against the Customs Acts and who have been adjudged to pay a penalty of £100 or upwards may, on subsequent conviction, be sentenced to imprisonment, with or without hard labour.

255. By the Customs and Inland Revenue Act, 1881,[2] it is provided (s. 12) that any officer of customs or other person duly employed in the prevention of smuggling may search any person on board any ship or boat within the limits of any port in the United Kingdom or the Channel Islands, or any person who shall have landed from any ship or boat, provided such officer or other person duly employed as aforesaid shall have good reason to suppose that such person is carrying or has any uncustomed or prohibited goods about his person. A person shall be guilty of an offence—

(1) If he staves, breaks, or destroys any goods to prevent the seizure thereof by an officer of customs or other persons authorised to seize the same. (2) If he rescues, or staves, breaks, or destroys, to prevent the securing thereof, any goods seized by an officer of customs or other person authorised to seize the same. (3) If he rescues any person apprehended for any offence punishable by fine or imprisonment under the Customs Acts. (4) If he prevents the apprehension of any such person. (5) If he assaults or obstructs any officer of customs, or any officer of the Army, Navy, marines, coastguard, or other person duly employed for the prevention of smuggling, going, remaining, or returning from on board a ship or boat within the limits of any port in the United Kingdom or the Channel Islands, or in searching such a ship or boat, or in searching a person who has landed from any such ship or boat, or in seizing any goods liable to forfeiture under the Customs Acts, or otherwise acting in the execution of his duty. (6) If he attempts or endeavours to commit, or aids, abets, or assists in the commission of any of the offences mentioned in this section. And a person so offending shall for each such offence forfeit a penalty not exceeding £100, and he may either be detained or proceeded against by information or summons.

Subsection (3).—*Defrauding the Revenue.*[3]

256. All fraudulent evasions of the provisions of the Revenue Acts, which provide for the payment of taxes or duties to Government, are criminal. By the Act of Union these statutes are made practically the same in Scotland as in England. The special Act usually prescribes the penalty for evasion of its provisions, and the tribunal which may impose it.

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[1] 42 & 43 Vict. c. 21. [2] 44 & 45 Vict. c. 12. [3] Anderson, p. 127 *et seq.*

Subsection (4).—*Post Office Offences.*[1]

257. Opening, intercepting, and detaining post letters is a crime at common law.[2] Crimes relating to the Post Office are now consolidated by the Post Office Act, 1908.[3] The offences under the Act are of various types, some being truly frauds on the revenue or breaches of public order, others being really forms of theft, reset, or breach of trust.

Section 6.—Crimes against the Person.

(*a*) Crimes involving Personal Injury generally.

Subsection (1).—*Homicide generally.*

258. Homicide is the generic term for the destruction of a self-existent human life, as the result of a real injury inflicted by an assailant. The human being whose life is destroyed must be self-existent.[4] So if a child be not completely born, its destruction, though criminal, is not homicide.[5] But if the child has breathed, it is homicide if it is killed, although the killing has taken place before the child is completely out of the body of the mother.[6]

259. There must be no doubt as to the cause of death. The injury inflicted must be a real one and not merely incidental to the death.[7] Death must have ensued in consequence of the injury. So long as the death can be clearly traced to the injury, the person who dealt the injury is responsible. The mere lapse of time between the injury and the death makes no difference.[8] Nor is it any defence that the injury was not necessarily fatal, but would, in more favourable circumstances, have been cured. Thus, if a man bleed to death owing to there being no surgeon at hand, his assailant is guilty, although the death would have been easily prevented if a surgeon could have been obtained. So, too, if through the want of proper care and attention, the injured person dies, the responsibility of the death rests on the assailant [9] unless the lack of care and attention be so extreme as truly to break the chain of causation between the injury and the death by setting up an independent cause.[10]

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[1] Macdonald, p. 64; Anderson, p. 190.

[2] *Holmes* v. *Lockyer*, 1869, 1 Coup. 221; 6 S.L.R. 389.

[3] 8 Edw. VII. c. 48.

[4] Macdonald, p. 120.

[5] Hume, i. 186; Alison, i. 71 *et seq.*; More, ii. 360; *M'Allum*, 1858, 3 Irv. 187; 31 Sc. Jur. 37.

[6] *H.M. Adv.* v. *Scott*, 1892, 19 R. (J.) 63; 3 White 240.

[7] Hume, i. 182. A libel which set forth that certain persons broke into a house, by way of hamesucken, to beat the owner, and that his wife being in childbed, she "by reason of the terror of the roaring and raging of the armed men about her," was thrown into a fever of which she died, was held irrelevant. *Duff*, 1707, *ibi cit.*

[8] Hume, i. 185; Alison, i. 150; Macdonald, p. 121; *H.M. Adv.* v. *Lang*, 1873, 2 Coup. 430.

[9] *Johnstone*, 1831, Bell's Notes, 69; *Shearer*, 1851, J. Shaw 468; *Macglashan*, Bell's Notes, 69; *Williamson*, 1866, 5 Irv. 326; *Dingwall*, 1867, 5 Irv. 466; 4 S.L.R. 249.

[10] *Flinn*, 1848, J. Shaw 9; *H.M. Adv.* v. *Norris*, 1886, 1 White 292; *Macglashan, supra*; *Williamson, supra*; Hume, i. 182.

260. The assailant cannot excuse himself by pleading that the injured person was weak or old or in a precarious state of health. The assailant takes his victim as he finds him.[1] Indeed, what would scarcely be criminal violence, if directed against a person in good health, may quite well be so in the case of a child or of an aged person.[2] The assailant is also saddled with the responsibility for any disease which supervenes as the direct result of the injury and causes death.[3] Thus the injury, though slight, may bring on tetanus or brain fever with the result that death ensues. But the disease must be clearly the result of the injury.[4] If it be independent of it, or not an ordinary result of it,[5] the chain of causation must be deemed to be broken [6] as in the case of flagrantly unskilful treatment already mentioned. The chain of causation between the injury and the death is clearly broken where a fresh injury inflicted by another person intervenes.[7] And if the injured person recovers so as to go abroad but thereafter dies, the presumption is that his death was not caused by the injury.

261. Homicide being, as above defined, the generic term for the destruction of a self-existent human life, as the result of a real injury inflicted by an assailant, a distinction falls to be made between criminal homicide and non-criminal homicide. Criminal homicide is subdivided into murder and culpable homicide according to the quality of the criminal intent displayed by the assailant. Non-criminal homicide is subdivided into justifiable homicide and casual homicide; in the former the intent to kill is present in the assailant, but the circumstances are such that he incurs no criminal liability; in the latter, the intent to kill is absent and the destruction of life consequently accidental. Each of these species of homicide falls to be considered separately, but a certain amount of overlapping in the treatment of the subject is inevitable.

Subsection (2).—*Murder.*[8]

262. Murder is a branch of criminal homicide, the other branch being culpable homicide. The dividing line between murder and culpable homicide is frequently very fine. The distinction between these crimes is that in the case of murder there is wilful and malicious intent to kill, or wicked recklessness as to consequences, while in the case of culpable homicide the malicious purpose and abandoned depravity

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[1] Hume, i. 183; Alison, i. 71, 149; *Smith*, 1858, 3 Irv. 72; *Macglashan, supra. Williamson, supra.*

[2] *Breckenridge*, 1836, 1 Swin. 153; Macdonald, p. 121, note and case there cited.

[3] Hume, i. 185; *Mackenzie*, 1827, Syme, 158; *Jones*, 1840, 2 Swin. 509 (form of indictment); *Wilson*, 1838, 2 Swin. 16; Bell's Notes, 70; *Shearer*, 1851, J. Shaw 468; *H.M. Adv.* v. *Peterson*, 1874, 2 Coup. 557; *H.M. Adv.* v. *Norris*, 1886, 1 White 292,

[4] If the supervening disease is the direct result of the injury, the prosecutor is not bound to set forth the disease in the indictment. *Stewart*, 1858, 3 Irv. 206.

[5] *M'Millan*, 1827, Syme 288; Hume, i. 184, note 1.

[6] *H.M. Adv.* v. *Heidmeisser*, 1879, 17 S.L.R. 266. [7] Macdonald, p. 120.

[8] Hume, i. 254 *et seq.*; Alison, i. 2 *et seq.*; Burnett, p. 46; Macdonald, p. 123 *et seq.*; Anderson, p. 148.

as to results are absent. In many cases there can be no dubiety that the crime which has been committed is murder. Thus, if no exonerating circumstances are present, it is murder to kill with intent to cause the death of any person. It is not necessary that the act should be premeditated.[1] It is murder if a person intends to cause grievous bodily injury to another, and death results. It is murder if A. is killed, although the intention was to kill or dangerously injure B. If anything be done with an unlawful object, death being a likely result, there is murder if death ensue, although, it may be, there was no intent to injure anyone. It is murder, if death results, where the intention was to do grievous bodily injury to facilitate the commission of a serious crime, or aid the escape of the offender.

263. The degree of recklessness which may bring a crime up to murder is always a question of circumstances. If the victim be a child, or an aged person, or a weakling, the same conduct may be held to amount to murderous recklessness which would not be so held where the murdered person is strong and fully grown.[2] The mental condition of the accused is always an element to be considered in determining whether homicide of the first or second degree has been committed. Thus where there is mental weakness or disease, not inferring complete irresponsibility, there is culpable homicide, where the same crime, in a person of sound mind, would be murder.[3] Although intoxication is no defence to a crime, the jury may nevertheless take such a condition into account in considering whether a crime is murder or culpable homicide.[4] The guiding principle in cases where an intoxicated person has slain someone is that he is guilty of murder unless at the time of the assault he was, owing to drunkenness, in such a condition that he had not the intention, and could not form the intention, of doing serious injury.[5]

264. The mode in which murder is committed is immaterial. Thus death may be caused by personal violence. There is no distinction between a lethal and a non-lethal weapon. Murder may be accomplished without the use of any weapon, as by lying on a person's chest and smothering him,[6] or by throwing sulphuric acid in a person's face and

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[1] *Macdonald*, 1867, 5 Irv. 525; 40 Sc. Jur. 92; 5 S.L.R. 120.

[2] *Breckenridge*, 1836, 1 Swin. 153.

[3] *Dingwall*, 1867, 5 Irv. 466; 4 S.L.R. 249; *H.M. Adv.* v. *Graham*, 1906, 5 Adam 212; 14 S.L.T. 579; *H.M. Adv.* v. *Ferguson*, 1881, 9 R. (J.) 9; 4 Coup. 552; *H.M. Adv.* v. *Brown*, 1882, 4 Coup. 596; 19 S.L.R. 594; *H.M. Adv.* v. *Gove*, 1882, 4 Coup. 598; 19 S.L.R. 594; *H.M. Adv.* v. *Smith*, 1893, 1 Adam 34; 1 S.L.T. 128; *H.M. Adv.* v. *M'Clinton*, 1902, 4 Adam 1; *H.M. Adv.* v. *Higgins*, 1914 S.C. (J.) 1; 7 Adam 229; *H.M. Adv.* v. *Abercrombie*, 23 R. (J.) 80; 2 Adam 163; see also *H.M. Adv.* v. *Edmonstone*, 1909, 2 S.L.T. 223; *H.M. Adv.* v. *M'Donald*, 1890, 2 White 517; *H.M. Adv.* v. *Brown*, 1886, 13 R. (J.) 50; 1 White 93; *H.M. Adv.* v. *Aitken*, 1902, 4 Adam 88; *H.M. Adv.* v. *Campbell*, 1921 S.C. (J.) 1; *H.M. Adv.* v. *Paterson*, 1897, 5 S.L.T. 13; *H.M. Adv.* v. *Savage*, 1923, J.C. 49.

[4] *H.M. Adv.* v. *Kane*, 1892, 3 White 386; cf. *H.M. Adv.* v. *Paterson*, *supra*.

[5] *H.M. Adv.* v. *Campbell*, 1921, J.C. 1, applying the principles laid down by the House of Lords in *Director of Public Prosecutions* v. *Beard*, 1920, 14 Cr. App. R. 159.

[6] *Burke*, 1828, Syme 345.

thus causing death. There may be murder where death results from blows with the fist. Murder may be accomplished even without a shew of violence. Thus a person may be starved to death, or pushed over a precipice, or he may be killed by the cutting of a rope,[1] or by the tilting up of a board, so that he falls,[2] or by the setting of a spring-gun.[3] Where grievous bodily injury is evidently designed, and death results, the crime is murder. But if death was not a probable consequence of the violence used, the homicide will only be of the second degree.[4] In this respect it is in favour of the less serious view that the accused discarded a deadly weapon and used his fists. It is no defence, however, that the deceased in a manner brought his fate upon him, as by challenging his antagonist to a duel. The crime in such a case is murder. Where the victim has died of poisoning [5] it is not essential that the fatal dose be administered by the mouth; it may be introduced into the body at other localities. The drug, moreover, need not be noxious in general; it is sufficient that the victim's particular condition makes it hurtful, and that this is known to the accused.

265. If death results in the course of the commission of a serious crime, it is murder, though there was no intention of killing, or even of seriously injuring, the deceased.[6] Thus it is murder if a pregnant woman die owing to the means employed to cause her to abort.[7] It is murder if a child die through being recklessly exposed to the weather.[8] If death result from an act of fire-raising, or as the consequence of a struggle with a robber, the crime is murder.[9]

266. It is open to a person charged with murder to plead that in the circumstances of the case he suffered provocation [10] such as to excuse him. It is obvious that the success of this defence must depend on the circumstances of the particular case. If a man be the object of a murderous attack, his slaying the assailant may well bring his act into the sphere of justifiable homicide. But provocation of a slight character will not justify the destruction of a human life. Verbal abuse, jostling, or throwing filth, do not justify retaliation by assault, and so none of these will excuse homicide.[11] Even a blow from the fist will not justify the extreme retaliation of homicide. The violence offered must cause reasonable alarm of serious injury. But if the retaliation is not reckless and grossly vindictive, it will be difficult to reach the conclusion that murder was intended. If a man is provoked by a blow, and retaliates with a blow, or even with several blows, the crime, if death results, is, at the most, culpable homicide. And generally where the provoca-

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[1] *M'Callum and Corner*, 1853, 1 Irv. 259.
[2] *Campbell*, 1836, 1 Swin. 309.
[3] *Craw*, 1826, Syme 188, 210.
[4] *H.M. Adv.* v. *Marshall*, 1896, 4 S.L.T. 217.
[5] Hume, i. 289; Macdonald, p. 125.
[6] Hume, i. 190; Alison, i. 73; Macdonald, p. 125.
[7] *Reid*, 1858, 3 Irv. 235; 31 Sc. Jur. 176; *H.M. Adv.* v. *Rae*, 1888, 2 White 62; 15 R. (J.) 80.
[8] Hume, i. 190; *Kerr*, 1860, 3 Irv. 645.
[9] *H.M. Adv.* v. *Brown*, 1879, 4 Coup. 225; *H.M. Adv.* v. *Fraser & Rollins*, 1920, J.C. 60.
[10] Macdonald, p. 127; Hume, i. 247.
[11] *Wright*, 1835, 1 Swin. 6; Bell's Notes, 77.

tion is not slight, but is not so extreme as to justify the taking of life, the crime will be regarded as culpable homicide rather than as murder.

267. Provocation is no defence if an interval of time has elapsed between the provocation and the retaliation.[1] Again, if the retaliation is made with deliberation and vindictiveness, so as to indicate a spirit of revenge rather than loss of presence of mind, the plea of provocation loses its efficacy.[2] Thus if, in retaliation for a blow, a man were to place poison in the food of him who has given the provocation, he would be guilty of murder if the poisoned food were taken, and death resulted. It is not a good defence to a charge of murder that the person killed was in the act of stealing the assailant's property. Thus it is murder to shoot a poacher or a thief by means of a spring-gun.[3]

268. An officer of the law who is charged with the duty of executing a warrant is bound to use force if he is resisted. It is therefore no defence to a person who has in these circumstances killed the officer, to urge that the officer was using violence. If, however, the officer meet his death while executing a defective warrant, or while acting outwith the jurisdiction of the magistrate who issued the warrant, or in arresting the wrong person, it is always a question of circumstances whether the crime is or is not murder. The ordinary rule applies to such cases, namely, that the person attacked will be excused in putting the officer to death only if the conduct of the officer has been such as to excite reasonable apprehension of serious injury. On the same grounds, an officer, who is in course of executing a warrant, is justified in putting to death the person against whom the warrant is issued only if the latter has threatened the officer with serious injury, or subjected him to actual violence of a dangerous character. It is not enough that the officer was merely afraid of being struck. An officer is guilty of murder if he kills a person against whom he holds a warrant who was endeavouring to avoid execution by flight. If an officer in executing an illegal warrant, or in executing a legal warrant illegally or on the wrong person, kills the person he was endeavouring to capture, the crime may amount

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[1] *Allison*, 1838, 2 Swin. 167.

[2] *Chaude Melle*.—The ancient Scottish Statutes distinguished between homicide, which was premeditated, or forethought felony, and that which took place on a sudden or in *chaude melle* (hot broil). This distinction is first noted in an old Act of 1371, and it is preserved in 1425, c. 51 ; 1426, c. 89, 95 ; 1469, c. 35 ; 1491, c. 28 ; 1535, c. 23 ; and 1555, c. 31. Under these statutes, while no indulgence was granted in the case of premeditated murder, the privilege of girth and sanctuary was allowed where the homicide took place in *chaude melle*. It was competent, under our ancient practice, to withdraw a refugee from the sanctuary in order that he might be tried ; but if he then proved his allegation of *chaude melle*, he had to be returned to the sanctuary, safe in life and limb. It has been said that the distinction between forethought slaughter and homicide in *chaude melle* was abolished by the Act 1661, c. 22, and that the distinction is no longer recognised in practice. Hume, however, shews conclusively that the latter form of homicide is really dealt with in the Statute of 1661 as casual homicide, and, as such, is punishable by an arbitrary penalty. There can, moreover, be no doubt that the distinction between these two forms of homicide still exists in practice, though the names have become obsolete. Homicide *in rixa* or *chaude melle* is never punished as murder. It is culpable homicide, and is punishable by an arbitrary sentence.—Hume, i. 240 ; Ersk. iv. 4, 40.

[3] *Craw*, 1827, Syme 188, 210.

to murder, unless the officer could not reasonably be expected to know of the irregularity or illegality.

269. Soldiers and sailors are justified in killing when this is in the line of their duty. When they are not on duty they are in the position of any other citizens. Even when they are on duty they are justified in putting civilians to death, on the occasion of a riot, only if they have been seriously attacked or threatened, not if they have merely been insulted verbally, or even if they have been pelted with missiles of a non-dangerous character.[1]

270. The punishment of murder is death, and confiscation of moveables.

Subsection (3).—*Attempt to Murder.*

(i) *At Common Law.*

271. A person may competently be charged, at common law, with attempt to murder.[2] It is immaterial whether the attempt has been made by direct violence, or by administering or attempting to administer poison, or by the employment of such indirect means of attack as cutting a rope or placing a spring-gun.[3] The intent to murder is held to be proved when the injury done shews utter recklessness as to the life of the victim; or, if no injury has been done, where the accused has done all he could to inflict serious injury, as where he points a pistol, but it misses fire, or the bullet does not hit its object. The intent is also presumed if poisoned food or drink is placed where it is likely to be partaken of.[4] Similarly, the crime is completed when A. hands poison to B. to be administered to C., whether B. is an accomplice of A. or is not.[5] The 61st section of the Criminal Procedure (Scotland) Act, 1887,[6] also makes it competent to charge attempt to murder as a substantive offence. The institutional writers are divided in opinion as to whether or not attempt to murder is punishable capitally at common law.[7] The authorities adduced by Hume, however, clearly establish that no higher penalty than an arbitrary sentence can follow on conviction of this crime.

(ii) *By Statute.*

272. By the Act 10 Geo. IV. c. 38, attempt to murder is made a capital crime. The statute specially provides that if it appears at the trial that, under the circumstances of the case, if death had ensued, the act or acts done would not have amounted to murder, the offender shall not be subject to capital punishment. The Act does not say whether this is to be decided by the judge or the jury. It is thought

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[1] See para. 287, *infra.*
[2] Hume, i. 27 *et seq.*; Alison, i. 165 *et seq.*; Macdonald, p. 144 *et seq.*; Anderson, p. 155.
[3] *Alcorn*, 1827, Syme 221; *Tumbleson*, 1863, 4 Irv. 426; 36 Sc. Jur. 1.
[4] *Williamson*, 1863, 36 Sc. Jur. 40.
[5] *Tumbleson, supra.*
[6] 50 & 51 Vict. c. 35.
[7] Mackenzie, ii. 5, 8; Ersk. Inst. iv. 4, 45; Hume, i. 180.

that it would be left to the jury.[1] Under the Act (ss. 1, 2) it is a capital offence wilfully, maliciously, and unlawfully to do any of the following acts:—

1. Shooting at any of His Majesty's subjects.[2]

2. Presenting, pointing, or levelling any kind of loaded [3] firearms at any of His Majesty's subjects, and attempting to discharge the same at or against his or their person or persons.[2]

3. Stabbing or cutting any of His Majesty's subjects, with intent to murder, maim, disfigure, disable, or to do some other grievous bodily harm.[4]

4. With like intent, administering, or causing to be administered to, or taken by, any of His Majesty's subjects, any deadly poison, or other noxious or destructive subject or thing.[4]

5. Attempting to suffocate any of His Majesty's subjects, with intent to murder or disable or to do some other grievous bodily harm.[5]

6. With like intent, attempting to strangle any of His Majesty's subjects.[5]

7. With like intent, attempting to drown any of His Majesty's subjects.[5]

8. Throwing at, or otherwise applying to any of His Majesty's subjects, any sulphuric acid or other corrosive substance calculated to injure the human frame, with intent, in so doing, to murder, or to maim, disfigure, or disable, or to do some other grievous bodily harm, and where, in consequence, any of His Majesty's subjects shall be maimed, disfigured, or disabled, or receive some other grievous bodily harm.[6]

It would probably be left to the jury to determine what amounts to "maiming, disfiguring, etc.," in the sense of the statute.[7]

273. The statute applies only to offences against His Majesty's subjects: aliens are not included. It is, however, unnecessary to set forth explicitly in the indictment that the injured person is a British subject. It is sufficient if he is so designed that it may naturally be inferred that he is a British subject.[8]

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[1] Macdonald, p. 146.

[2] With regard to these offences involving the use of firearms, no special intent is required as in the other offences provided for in the Act. Where there was proof of shooting, but only with intent to do "bodily harm," the conviction was held good. *Duncan*, 1845, 2 Broun 455; *Robertson*, 1833, Bell's Notes, 67; *Blair*, 1836, Bell's Notes, 68. It is not necessary that actual injury should have been inflicted.

[3] "Loaded" does not necessarily mean "charged with powder and lead"; powder and paper-wadding is enough. *Blackwood*, 1853, 1 Irv. 223.

[4] In such offences actual injury must have been done.

[5] In such offences there need not have been actual injury, but intent must be plainly shewn. Macdonald, p. 146.

[6] In this offence, actual injury must have been done, and the injury must have been of a serious character. *Wood*, 1836, 1 Swin. 283. The actual victim need not be the person for whom the injury was intended. *Beaton*, 1842, 1 Broun 313.

[7] *Wood, supra.*

[8] *H.M. Adv.* v. *Davidson*, 1882, 4 Coup. 600; 19 S.L.R. 727.

Subsection (4).—*Culpable Homicide.*

274. Culpable homicide is the second branch of criminal homicide.[1] It is differentiated from murder by the absence of that wilful intent to kill or utter regardlessness of consequences which characterise that crime. Cases of culpable homicide vary in character and circumstances from those which are barely distinguishable from murder to those in which the *culpa* is of the most venial nature. There are three groups or classes into which cases of culpable homicide may be divided:—

(i) *Where there is Intent to Kill.*

275. Even where the intent to kill is present, and destruction of life follows, the quality of the act as murder, culpable homicide, or justifiable homicide depends, as has already been explained,[2] on the circumstances of the particular case and especially on the amount of provocation offered. Culpable homicide stands between murder, where provocation is absent or of a slight character, and justifiable homicide, where justification is complete. Thus, if a man kills another after serious provocation, the crime is culpable homicide, and not murder. It is not enough that there are verbal insults, however gross. Nor may an assault by a slight blow be met by a grave assault which results in the death of the assailant. The law allows no more than retaliation in kind. If the retaliation is excessive, and out of proportion to the provocation, the ensuing homicide is of the first degree. Homicide in *chaude melle* falls under this category, it being assumed that in such a case there was due provocation. But it is only where a combat sprang up suddenly and was fought in hot blood that this rule applies. If a fight is deliberately arranged and carried out, as in a duel, then, if death ensues, the crime is murder.[3] If a husband instantly kills his wife's seducer, when the couple are caught in the act of adultery, the crime is culpable homicide; but if the husband kills after an interval, and with deliberation, the crime is murder.[4]

276. Killing in self-defence is justifiable homicide.[5] If, however, the killing was unnecessary for self-defence, although there was ground for alarm, the crime is culpable homicide.[6] If burglars enter a man's house and he kills one of them, it will be justifiable homicide if he was justifiably alarmed for his safety, but if there be no such justifiable alarm as, *e.g.*, if the burglars are in retreat, the slayer will be guilty of culpable homicide.[7] If the person whose life is in danger has a means of escape and does not take advantage of it, but chooses to kill his adversary, or if he kills the other when the danger is over, the crime is culpable homicide. If one, by using insulting language, or by making a slight assault on another, brings upon himself an attack and has to

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[1] Para. 261, *supra*; Macdonald, p. 131; Anderson, p. 152 *et seq.* [2] Para. 267, *supra*.
[3] Hume, i. 247. [4] Hume, i. 218; Alison, i. 102; but *cf.* More, ii. 366.
[5] Para. 286, *infra*. [6] Hume, i. 228; Alison, i. 92; *Forrest*, 1837, 1 Swin. 404.
[7] *Lane*, 1830, Bell's Notes, 77; Hume, i. 220; Alison, i. 104.

slay his assailant in self-defence, the killing is not justifiable, but culpable, owing to the initial conduct of the person he has killed.[1]

277. Public officials who have a duty to kill in certain circumstances may be guilty of culpable homicide, or even murder, if they kill rashly or even unnecessarily.[2]

Where there is mental weakness or disease not resulting in complete irresponsibility, an act which in the case of a person of a sound mind would be murder, is reduced to culpable homicide.[3]

(ii) *Unlawful or Careless Conduct without Intent to Kill.*

278. The act of the accused and the death must be causally connected, but it is not necessary that the act be the immediate cause of the death. So long as it is the circumstance initiating the sequence of events ending in death, the doer of the act is held liable. It does not affect the charge that death was not a likely or probable result of the act which caused it, or was not contemplated by the accused.[4] The culpability may vary from the most outrageous assault to the slightest injury which terminates in a fatality.[5]

It is not necessary that actual violence should have been used towards the deceased, if death has resulted from rash or careless conduct. If a child is suffocated at birth owing to the mother having failed to obtain assistance, the crime is culpable homicide, and it is immaterial that she did not conceal her pregnancy.[6] If a child is deserted, and dies, the crime is at least culpable homicide.[7] If spirits or drugs are administered, and death is thereby caused,[8] or if death results from the reckless use of firearms or explosive fireworks, or the like, there is culpable homicide.[9] If those who are in charge of young persons,[10] or of infirm persons,[11] or paupers,[12] so neglect or ill-treat them as to cause death, they are guilty of culpable homicide.

279. While the injury inflicted, or act done rashly or carelessly, must be causally connected with the death, it is immaterial that death results only indirectly from the act done. Thus if a husband attacks

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[1] Hume, i. 233.

[2] Hume, i. 216; Alison, i. 43, 110; Burnett, pp. 77, 79; see paras. 268, *supra*, and 286, 287, *infra*.

[3] *H.M. Adv.* v. *Ferguson*, 1881, 9 R. (J.) 9; 4 Coup. 552; *H.M. Adv.* v. *Brown*, 1882, 4 Coup. 596; *H.M. Adv.* v. *Gove*, 1882, 4 Coup. 598; *H.M. Adv.* v. *Smith*, 1893, 1 Adam 34; *H.M. Adv.* v. *Savage*, 1923, J.C. 49. See also para. 263, and cases there cited.

[4] Hume, i. 234; *M'Anally*, 1836, 1 Swin. 210; Bell's Notes, 77.

[5] *Grace*, 1835, 1 Swin. 14 (fight with fists); *M'Riner*, 1844, 2 Broun 262 (assault); *M'Laughlin*, 1845, 2 Broun 387 (sudden blow in retaliation); *Brodie*, 1846, Ark. 45 (throwing down); *Vance*, 1849, J. Shaw 211 (assault and throwing down); *H.M. Adv.* v. *Broadley*, 1884, 5 Coup. 490 (man drowned by being knocked into water in drunken brawl).

[6] *H.M. Adv.* v. *Martin*, 1877, 3 Coup. 379; *H.M. Adv.* v. *Scott*, 1892, 3 White 240.

[7] Hume, i. 235; Alison, i. 99.

[8] Hume, i. 237; *Crawford*, 1847, Ark. 394; *Hamilton*, 1857, 2 Irv. 738.

[9] Hume, i. 192; *Wood and King*, 1842, 1 Broun 262; *M'Bryde*, 1843, 1 Broun 558; *Smith*, 1858, 3 Irv. 72.

[10] *M'Gavin*, 1846, Ark. 67.

[11] *M'Manimy*, 1847, Ark. 321; *Fay*, 1847, Ark. 397.

[12] *Hardie*, 1847, Ark. 247.

his wife and she falls, and the child in her arms is killed, the husband is guilty of culpable homicide. So, too, if the child's death results from its being squeezed in the mother's arms owing to the husband's violence towards her.[1] It is culpable homicide to flog the horse on which a person is riding, so that it runs off and kills him, or to throw a stone out of a window into the street, and thereby kill a passer-by.[2] Compelling children to leave a house in inclement weather, so that they perish from exposure, is culpable homicide.[3]

280. It is no defence to a charge of culpable homicide that the victim was, unknown to the assailant, in a precarious state of health. The assailant must take his victim as he finds him. This is equally true of latent physical and latent emotional weakness. It is no defence to say that the deceased had a weak constitution or a weak heart,[4] or that the reason for the injury being fatal was not the violence of the injury but shock, which in a normal person would have produced no fatal result. Even if a person, in terror of the violence of another, does something which causes his own death, the person using the violence may be guilty of culpable homicide.[5] Thus where a woman, in order to escape men who intended to ravish her, ran off in the dark and fell over a precipice, her assailants were found guilty of culpable homicide.[6]

(iii) *Negligence or Rashness in the Performance of Lawful Duty.*

281. Under this head there is culpable homicide where death ensues from circumstances which were not completely casual—where, in short, there is *culpa*.[7] If a person entitled to inflict corporal punishment exceeds moderation in doing so, and death results, this is culpable homicide.[8] Rashness or carelessness on the part of drivers of vehicles (*e.g.* careless driving, or leaving vehicles unattended, or allowing an unskilled person to drive) which results in death may found a charge of culpable homicide.[9] The carelessness of railway servants—drivers, pointsmen, signalmen, guards, stationmasters, porters, etc.—may amount to culpable homicide.[10] Those who have charge of sailing vessels, steamers, or boats may be charged with culpable homicide if, by their carelessness, life is lost either on board their own vessel or in

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[1] *Mitchell*, 1856, 2 Irv. 488.
[2] *Keay*, 1837, 1 Swin. 543; Bell's Notes, 88, per Lord Moncreiff.
[3] Cf. *H.M. Adv.* v. *Watt and Kerr*, 1868, 1 Coup. 123 (compelling stowaways to leave ship).
[4] *H.M. Adv.* v. *Brown*, 1879, 4 Coup. 225.
[5] Hume, i. 225, 236; *Robertson*, 1854, 1 Irv. 469.
[6] *H.M. Adv.* v. *Slaven*, 1885, 5 Coup. 694.
[7] Macdonald, p. 136; *Murray*, 1840, Bell's Notes, 77.
[8] Hume, i. 237; *Patterson*, 1838, 2 Swin. 175; Bell's Notes, 79; *H.M. Adv.* v. *Evans*, 1873, 2 Coup. 410.
[9] Hume, i. 192; Alison, i. 118; *Gowans*, 1831, Bell's Notes, 70; *Stoddart*, 1836, Bell's Notes, 73; *Matheson*, 1837, Bell's Notes, 70; *M'Arthur*, 1841, Bell's Notes, 74; *Messon*, 1841, 2 Swin. 548; *Trotter*, 1842, Bell's Notes, 74; *Smith*, 1842, 1 Broun 220; *Wood and King*, 1842, 1 Broun 262; *Ross and Ors.*, 1847, Ark. 258; *Lonie* 1862, 4 Irv. 204.
[10] Macdonald, p. 137, note 1, and cases there cited.

other vessels.[1] The same charge may be preferred against those who are responsible for machinery used in coal mines,[2] or for the handling of dangerous materials.[3] Contractors carrying on works are criminally responsible for negligence and carelessness which result in loss of life,[4] and this includes failure on the part of the contractors to exercise proper superintendence over subordinates.[5] An unqualified person who dispenses drugs which cause death is guilty of culpable homicide.[6] The same charge was relevantly laid against a druggist who sold a poison by mistake for a harmless medicine.[7]

282. If there is fault, but this was not the cause of death, a charge of culpable homicide will not lie. Thus if an engine leaves the rails through no fault of the driver, he is not responsible for the death of a person whom he culpably allowed to ride on the engine.[8] But if a death is due to an engine-driver's fault, it is no defence to the charge of culpable homicide that the person killed had no right to be on the train.[9]

283. Homicide may result from the separate faults of several persons. When this is so, each is responsible, and they may all be indicted for the crime.[10] Obedience to orders does not exonerate a person charged with culpable homicide, if what he did was obviously dangerous.[11] Even adherence to the directions of by-laws will not always free from responsibility.[12] But violation of by-laws is *prima facie* proof of culpability.[13]

284. The punishment of culpable homicide varies from penal servitude or imprisonment in serious cases to fine or a nominal sentence in cases where the culpability is slight.[14]

Subsection (5).—*Casual Homicide.*

285. Non-criminal homicide comprises both justifiable and casual homicide. In the former the killing is intentional; in the latter it is non-intentional or accidental. Homicide is casual when it results from pure misadventure, when there was no intention to kill or inflict bodily harm, and when the killer was, at the time of the death, lawfully employed,

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[1] Hume, i. 193; *M'Alister*, 1837, 1 Swin. 587; *Sutherland*, 1838, Bell's Notes, 74; *Maclean*, 1842, 1 Broun 416; *Henderson*, 1850, J. Shaw 394; *Macpherson*, 1861, 4 Irv. 85; *H.M. Adv.* v. *Grassom and Drummond*, 1884, 5 Coup. 483.

[2] *Rouatt*, 1852, 1 Irv. 79; *Stenhouse & Mackay*, 1852, 1 Irv. 94.

[3] *Drysdale*, 1848, Ark. 440; *Auld*, 1856, 2 Irv. 459; *H.M. Adv.* v. *Clark*, 1877, 4 R. (J.) 48; 3 Coup. 472 and 504.

[4] Hume, i. 192; *Kirkpatrick & Stewart*, 1840, Bell's Notes, 71; *M'Lure and Ors.*, 1848, Ark. 448; *Wilson*, 1852, 1 Irv. 84.

[5] *Kirkpatrick & Stewart, supra; Drysdale, supra.* [6] *Wheatley*, 1853, 1 Irv. 225.

[7] *H.M. Adv.* v. *Armitage*, 1885, 5 Coup. 675; *H.M. Adv.* v. *Wood*, 1903, 4 Adam 150.

[8] *Gray*, 1836, 1 Swin. 328. [9] *Laird*, 1833, 6 Sc. Jur. 42.

[10] *Gowans*, 1831, Bell's Notes, 70; *Ross and Ors.*, 1847, Ark. 258; *Henderson and Lawson*, 1842, 1 Broun 360; *Drysdale, supra; Hamilton and Hutchison*, 1874, 3 Coup. 19; *Little and Ors.*, 1883, 5 Coup. 259.

[11] *Boyd*, 1842, 1 Broun 7; *Paton*, 1845, 2 Broun 525.

[12] *Trotter*, 1842, Bell's Notes, 74. [13] *Houston*, 1847, Ark. 252; *Auld*, 1856, 2 Irv. 459.

[14] *H.M. Adv.* v. *A. B.*, 1887, 1 White 532.

and exercising due care to avoid damage to his neighbour. Not only must intention to kill be absent, but there must be absence of all criminal intent whatsoever. If there is a purpose to injure, though not to kill, there is *culpa*, and the killing cannot be said to be casual. If even a lawful act be rashly or recklessly performed, and death ensue, there is a certain amount of blame, and the homicide is not purely accidental. The Act 1661, c. 22, which deals with the several degrees of casual homicide, and imposes a punishment of fine and imprisonment for these offences, does not employ the term "casual" in the sense of accidental, but rather in the sense of sudden or unforeseen. Casual homicide, in the meaning of this statute, is homicide *in rixa* or in *chaude melle*.[1] As casual homicide, in the sense in which the term is used in this paragraph, is non-criminal it is non-punishable.

Subsection (6).—*Justifiable Homicide.*

286. There are certain circumstances in which the wilful killing of a person is held in law to be justifiable. The most obvious illustration of this is the case of a properly-qualified judge, with the requisite jurisdiction, who sentences to death a pannel found guilty of a capital crime; as also the case of the magistrates and officials who, under proper warrant, regularly execute the sentence. An officer of the law, holding an *ex facie* legal warrant, who kills a person violently resisting the execution of the warrant or seriously threatening his life while engaged in its execution, affords another instance of justifiable homicide.[2] The circumstances under which an officer of the law loses his immunity have been already described.[3] In the case of riots or civil commotion, since magistrates, soldiers, policemen, and even ordinary citizens are bound to quell them, they are entitled to employ so much force, even to the taking of life, as may be necessary for the quelling of the disturbance. It is a question of circumstances whether the emergency justifies homicide.[4] But where a mob commits, or threatens to commit, violence to life and property, homicide is justified.[5] The Riot Act [6] provides that the magistrate who uses force to disperse a mob after the expiry of an hour after the reading of the proclamation contained in the Act, commits justifiable homicide if anyone be killed. But the magistrate is not precluded from using force before the expiry of the hour; the common law gives him the right to use force wherever the emergency demands it.[7]

287. As a general rule, soldiers, sailors, and policemen who act in accordance with the rules of their service or in obedience to orders from a superior, will be justified if they commit homicide.[8] So, if during a riot they fire on a mob at the command of an officer or magistrate,

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[1] See para. 267, *supra*.
[2] Macdonald, p. 141; Hume, i. 197 *et seq.*; Alison, i. 29, 131.
[3] Para. 268, *supra*.
[4] Macdonald, p. 141; Dicey, Law of the Constitution, 8th ed., chaps. viii. and ix.
[5] Hume, *supra*; Alison, *supra*.
[6] 1 Geo. I. c. 5.
[7] Dicey, *op. cit.*, p. 286.
[8] *Hawton*, 1861, 4 Irv. 58; see para. 269, *supra*.

they will not be held liable for any death which may result, even although the circumstances be such that the officer or magistrate giving the order exceeded his duty and used unnecessary force. It would appear, however, that obedience to an order will be no excuse if the order be flagrantly illegal.[1]

288. To kill a person in self-defence, where he murderously attacks, is justifiable. Whether the plea of self-defence will be successful must depend on the circumstances of the particular case. The question will be, had the accused reason to fear immediate danger to his own life or the safety of others?[2] It is not enough that he was agitated; that may reduce the charge to culpable homicide of a slight degree; but only reasonable alarm will completely justify homicide.[3] A woman attacked by a ravisher may kill him; and a third person may do so if this is necessary in order to prevent rape.[4] In cases of imminent danger it is justifiable to kill a robber.[5] In cases of housebreaking by night the danger is presumed to be imminent.

Subsection (7).—*Hamesucken.*[6]

289. "Haymsucken is when ane man searches and seeks ane other man at his house, or assailzies his house to slay him, or to do him any injury, whilk crime is punished be death and confiscation of his moveable gudes."[7] This crime can be committed only in the house of the victim, or, as Hume puts it, "his domicile, or settled place of dwelling, *ubi calumnians est manens, surgens et cubitans, die ac nocte.*" This definition excludes all places of merely temporary residence, or of business—even although the house may be under the same roof; but it is immaterial whether the occupier be proprietor or tenant. While the offence cannot be committed on a mere lodger in an inn, the landlord appears entitled to the same protection under his own roof as another man, provided the offence is committed under circumstances amounting to hamesucken. The invasion must be of the house. The precincts of the house, such as the courtyard, are not comprehended in the term "home." "It is settled, likewise, that the house affords this high protection, not only to the master of the family, but his wife, children, and servants, and in general all the members of his household who are there at bed and board, so that under his roof they have their home and biding-place, and deem themselves secure from harm."[8] A lodger was held entitled to the protection where he was an inmate of the house, as distinguished from a merely temporary residenter.[9]

290. There must be the preconceived intention to commit the assault. "It is in the premeditated seeking of the person at his home

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[1] Macdonald, p. 142; Dicey, *op. cit.*, p. 301; Stephen, Hist. of Criminal Law, i. 205.
[2] *Forrest*, 1837, 1 Swin. 404, at p. 418; Hume, i. 223. [3] *Forrest*, *supra*, pp. 418, 420.
[4] Hume, i. 218. [5] Hume, i. 217; Act 1661, c. 22.
[6] Hume, i. 312; Bell's Notes, 86–7; Alison, i. 201; Macdonald, p. 162; Anderson, p. 163.
[7] Skene, Treatise of Crimes; Hume, i. 321.
[8] Hume, i. 314, and case of *Gray*, 1800, there cited.
[9] *Johnston*, 1754, cited by Hume, i. 314.

to assault him that the aggravated and distinctive character of hamesucken lies." [1] This excludes assaults committed under the following circumstances: (*a*) arising out of a sudden quarrel after entry to a house; (*b*) violence commencing outside, and continued in the house, to which the sufferer flies for protection; (*c*) where the entry to the house is for another purpose, although felonious, *e.g.* theft, provided that in the execution of such purpose violence was not necessarily contemplated; (*d*) violence committed in error by an officer of the law in execution of a warrant, either on the wrong person, or under a defective warrant, or by irregular proceedings.

291. As regards the mode of entry, "it is sufficient that there be an entry against the King's peace." [2] Entry may be obtained by terrifying those within, or by artifice, or by secretly entering and lying in wait for opportunity of assault. Actual entry is unnecessary where the security of the house to its master is destroyed, as where he is attacked and wounded within the house, although this is done from the outside. The attack may be outside where a person has been forced by violence to leave the house; but, contrary to the opinion of Mackenzie, it does not appear to be hamesucken where the owner has been induced by artifice to leave the house, and is then attacked outside.[3]

292. The injury inflicted or contemplated must be serious, and not such "as savours more of insult and contempt than of enmity or resolution to do him harm"; [4] but actual physical injury is not necessary. There may be cases where the injury "is not to be measured by the mere bodily suffering, but by the alarm and terror attending the assault in the whole circumstances of the case, and especially the colour of the ultimate and meditated wrong." [4]

293. Hamesucken was, until the passing of the Criminal Procedure Act, 1887, capital. The opinion has been expressed that no less punishment than penal servitude would now be inflicted.[5]

Subsection (8).—*Assault.*[6]

294. Assault is criminal attack on the person. It is not necessary that injury be inflicted. An attack by spitting or throwing dirt is an assault.[7] It is not necessary that the act done should take effect, if in its nature it is an assault. Firing at another person, or aiming a blow at him, is an assault, although the shot does not strike him, or the blow fall short or be evaded.[8] There are also cases of indirect assault such as hounding a dog on a person, or striking his horse to cause it to run off,[9] or violently stopping a horse that is being ridden or driven.[10] A very bad assault may be committed by a slight physical act, such as pushing a

[1] Hume, i. 319. [2] Hume, i. 318. [3] Hume, i. 317. [4] Hume, i. 320.
[5] Macdonald, p. 165.
[6] Hume, i. 327; Alison, i. 175; Macdonald, p. 153 *et seq.*; Anderson, 158.
[7] *Cairns*, 1837, 1 Swin. 597; Bell's Notes, 88.
[8] *Stewart*, 1829, 2 Sc. Jur. 32; *Earl of Mar*, 1831, Bell's Notes, 89.
[9] *Keay*, 1837, 1 Swin. 543; Bell's Notes, 88.
[10] *Kennedy* v. *Young*, 1854, 1 Irv. 533; 26 Sc. Jur. 574.

person off a train, or down a stair or precipice.[1] Assault may be committed by violent menace, say with a firearm,[2] although the assailant do not draw the trigger, or cock the weapon.[3] If the weapon be not loaded, the offence is still assault, unless the person attacked knew the fact.[4] Threatening gestures producing alarm of injury constitute assault even without threats by word,[5] but words alone are not enough. There must be intent against the person. Injury caused by carelessness or an act of mischief is not assault.[6]

295. Provocation [7] by words will not justify, it will only palliate assault. Blows justify, if the retaliation is not excessive. Self-defence may be a good answer to the charge.[8] Extraordinary provocation would be required to vindicate assault on a wife.[9] Cruel ill-usage by a parent might excuse assault by a son or daughter.[10] Provocation must be recent, but a libel published several days before is pleadable.[11] Verbal provocation must have been very recent, probably at least on the same day,[12] but a series of provocative wrongs may justify reference to the earlier ones although beyond one day.[13]

296. Assault may be aggravated in various ways.[14]

First, there may be aggravation by the intent with which the assault is committed, as where there is intent to kill or do grievous injury; [15] to ravish; [16] to gratify lewdness on women,[17] or young persons of either sex; [18] to abduct; [19] to rob; [20] to intimidate employers or workmen, or the like; [21] to extort confession; [22] to rescue prisoners.[23]

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[1] *Leys*, 1839, 2 Swin. 337; Bell's Notes, 88.

[2] *Dewar*, 1842, 1 Broun 233; Bell's Notes, 89.

[3] *Earl of Mar*, 1831, Bell's Notes, 89; Alison, i. 175; Macdonald, p. 153.

[4] *Morison*, 1842, 1 Broun 394.

[5] *Irving*, 1833, Bell's Notes, 88.

[6] *Irving, supra; Keay*, 1837, 1 Swin. 543; Bell's Notes, 88; *Roy*, 1839, Bell's Notes, 88; Macdonald, p. 154; *H.M. Adv.* v. *Phipps*, 1905, 4 Adam 616 (corporal punishment inflicted by a teacher is not assault so long as it is reasonable); *M'Shane* v. *Paton*, 1922 S.C. (J.) 26.

[7] Hume, i. 333; Alison, i. 176.

[8] *Mackenzie* v. *Gray*, 1898, 1 F. (J.) 23; 2 Adam 625.

[9] *Burnet*, 1834, Bell's Notes, 91.

[10] *Dow*, 1830, Bell's Notes, 87; *M'Anally*, 1836, 1 Swin. 210, at p. 217; Bell's Notes, 87.

[11] *Cameron*, 1832, 5 Deas & And. 257.

[12] Hume, i. 336; *Stewart*, 1837, 1 Swin. 540; Bell's Notes, 91.

[13] Hume, i. 336, and cases there.

[14] There may be aggravation though there is no actual injury (*H.M. Adv.* v. *Thom*, 1876, 3 Coup. 332).

[15] *Brown*, 1827, Syme 152; *Lougton*, 1831, Bell's Notes, 88.

[16] Hume, i. 308, 309; Alison, i. 184–7; Macdonald, p. 156; it is doubtful whether this applies in case of a child where no violence was used, but only persuasion (*M'Arthur*, 1830, S. (Just.) 211); but if there be an attempt to have connection, then that is an assault in such a case (*Buchan*, 1832, Bell's Notes, 84).

[17] *Thomson*, 1831, Bell's Notes, 86. As to endeavouring to have connection with a woman who is asleep, see *H.M. Adv.* v. *Thomson*, 1872, 2 Coup. 346; see para. 303, *infra*.

[18] For assaults of this nature on girls, see *Borrowman*, 1837, Bell's Notes, 86; *Galloway*, 1838, Bell's Notes, 85; *Johnston*, 1844, 2 Broun 261 n.; *Yates*, 1851, 24 Sc. Jur. 141; *M'Namara*, 1848, Ark. 521; *Philip*, 1855, 2 Irv. 243; 28 Sc. Jur. 1; for assaults on boys, see *Brown*, 1844, 2 Broun 261; *Lyall*, 1853, 1 Irv. 218.

[19] Hume, i. 329.

[20] Hume, i. 329; Alison, i. 188.

[21] *Ewing*, 1821, S. (Just.) 64.

[22] *Findlater*, 1841, 2 Swin. 527; *Thomson*, 1837, 1 Swin. 532.

[23] *M'Lellan*, 1842, 1 Broun 478.

Second, there may be aggravation by the mode in which the assault is committed,[1] as, if firearms be used,[2] or even if their use be threatened only,[3] or if there be stabbing or cutting,[4] or throwing of acids,[5] or applying fire to the victim.

Third, there may be aggravation in the extent of the injury inflicted,[6] as where life is endangered, or the injury is extensive, or mutilation or permanent disfiguration ensues,[7] or disease is communicated.[8]

Fourth, it is an aggravation if the character of the assault tends to expose the person to great danger.[9]

Fifth, there may be aggravation from the place where the assault is made. Assaults in presence of, or in the domain of, the Sovereign, or in the Supreme Courts of Justice, are aggravated.[10] It is an aggravation if the assault is on the person in his own premises, especially if he is sought there for the purpose.[11]

Sixth, there may be aggravation on account of the relation in which the assailant stands to his victim or of the quality of the victim, but in the latter case the quality of the victim must be known to the offender.[12] Examples of this type of aggravation include: Assaults on parents;[13] on young children, and especially by a parent; on a child by a person in charge of it, and especially if indecently;[14] by a husband on a wife; on a pregnant woman; on an infirm person; on a clergyman;[15] on a judge;[16] on a magistrate on duty,[17] or in reference to official conduct;[18] on an officer or Privy Councillor of Crown, or an officer of law[19] because of duty done; on soldiers aiding civil power;[20] on a prisoner by an officer in charge of him;[21] on a member of the College of Justice.[22]

Seventh, it is an aggravation of any act of assault that the offender has been previously convicted of any crime inferring personal violence.[23]

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[1] See para. 294, *supra*. [2] Alison, i. 179 *et seq.*; Macdonald, p. 157.
[3] *Morison*, 1842, 1 Broun 394; Bell's Notes, 89.
[4] *Affleck*, 1842, 1 Broun 354; *Hagan*, 1853, 1 Irv. 342.
[5] *Fitchie*, 1856, 2 Irv. 485; *Fitzherbert*, 1858, 3 Irv. 63.
[6] Hume, i. 330; Alison, i. 181 *et seq.*, 195 *et seq.*; Macdonald, p. 158.
[7] *Brown*, 1842, 1 Broun 230, Bell's Notes, 89.
[8] *Mack*, 1858, 3 Irv. 310.
[9] *H.M. Adv.* v. *Thom*, 1876, 3 Coup. 332 (throwing person out of a train).
[10] Hume, i. 326, 405.
[11] Hume, i. 318; Alison, i. 196; Macdonald, p. 159; *Williamson*, 1853, 1 Irv. 244.
[12] *Alexander*, 1842, 1 Broun 28; Bell's Notes, 102; *M'Lellan*, 1842, 1 Broun 478; but see *O'Brien* v. *M'Phee*, *infra*.
[13] *Alves*, 1830, 5 Deas & And. 147; *Beatson*, 1836, 1 Swin. 254. Beating and cursing parents was formerly capital by Act 1661, c. 20; see Hume, i. 324.
[14] *Brown*, 1844, 2 Broun 261.
[15] *Williamson*, 1853, 1 Irv. 244.
[16] Hume, i. 245.
[17] *Falconer*, 1847, Ark. 242; *Nicholson*, 1847, Ark. 264; *Laughlan*, 1821, S. (Just.) 65.
[18] Alison, i. 194 *et seq.*, 573 *et seq.*; *Duncan*, 1827, Syme 280; *Irving*, 1833, Bell's Notes, 88.
[19] Macdonald, p. 160; *Smith*, 1859, 3 Irv. 506; *O'Brien* v. *M'Phee*, 1880, 8 R. (J.) 8; 4 Coup. 375; *Mauchline* v. *Stevenson*, 1878, 5 R. (J.) 21; 4 Coup. 20.
[20] *Nicholson*, 1847, Ark. 264.
[21] *Findlater*, 1841, 2 Swin. 527; Bell's Notes, 92.
[22] *H.M. Adv.* v. *M'Donald*, 1872, 2 Coup. 174.
[23] Criminal Procedure Act, 1887, s. 64; Summary Jurisdiction Act, 1908, s. 5.

Subsection (9).—*Drugging.*

297. Administering drugs "so as to stupefy and deprive of consciousness," although there be no further intent, and no damage result, is sufficient to constitute an offence, unless it be done for a lawful purpose. "No case has as yet occurred in which the act stood alone. . . . But it seems impossible to doubt the relevancy of such a charge." [1] The crime usually occurs in conjunction with some other criminal intent. Drugging the owner or custodier of property is an aggravation of theft.[2] In the case of *Mitchell*,[3] the charge was one of feloniously administering drugs to the injury of the person, and with the aggravation of having done this with the intention of preventing one of the lieges from following his lawful business or exercising his political rights. It is culpable homicide if, for a frolic, something likely to sicken the person taking it be mixed with food or drink, and death ensue, even though the substance administered be not in itself dangerous to life.[4] Improperly giving laudanum to a child to put it to sleep also constitutes culpable homicide.[5] To have connection with a woman whose resistance has been overcome by drugging her is rape.[6] The punishment of drugging is either imprisonment or penal servitude.

Subsection (10).—*Maiming.*

298. This crime consists in injuring the body of a person by forcibly depriving him of the use of some member serviceable in fight. This, of course, may be charged as an attempt to murder or an aggravated assault, as the circumstances warrant. By 10 Geo. IV. c. 38, s. 2, if any person shall, within Scotland, "wilfully, maliciously, and unlawfully stab or cut any of His Majesty's subjects, with intent in so doing, or by means thereof, to murder or to maim, disfigure or disable such His Majesty's subject or subjects," or with intent to do them some other grievous bodily harm, such person shall be held guilty of a capital crime, and shall receive sentence of death accordingly. The crime is still a capital offence.[7]

Subsection (11).—*Demembration.*[8]

299. Demembration and mutilation of a member were regarded in former times as offences of the gravest nature. Indeed, an old Act of Robert II. (Stat. 11, No. 2) seems to make death the punishment of mutilation. Hume, too, points out that in some of our old statutes

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[1] Macdonald, p. 174; but see *H.M. Adv.* v. *Milne & Barry*, 1868, 1 Coup. 28.
[2] Bell's Notes, 22. As to whether this constitutes robbery, see Macdonald, pp. 37, 38.
[3] 1833, Bell's Notes, 90.
[4] Hume, i. 237; Alison, i. 99; Macdonald, p. 134.
[5] *Crawford*, 1847, Ark. 394; *Hamilton*, 1857, 2 Irv. 738.
[6] Hume, i. 303; Burnett, p. 103; Alison, i. 211; *Fraser*, 1847, Ark. 280 (opinions); *Sweenie*, 1858, 3 Irv. 109; Macdonald, p. 166.
[7] Criminal Procedure Act, 1887, s. 56; see para. 272, *supra*.
[8] Hume, i. 330; Alison, i. 195; Ersk. iv. 4, 50; Macdonald, p. 158.

(*e.g.* 1540, c. 118; 1579, c. 76; 1612, c. 3) the crimes of mutilation and demembration are either said to be capital offences or are classed with such as are so. No instance, however, occurs in the records of a capital sentence having followed conviction of either of those crimes. They would now be charged and punished as aggravated assaults.

Subsection (12).—*Furious and Reckless Riding and Driving.*

300. Riding horses or driving vehicles furiously in a public place to the danger of the lieges is punishable.[1] Driving a vehicle on a public street in a culpable and reckless manner, whereby injury to property is caused, is not a crime at common law unless the driving is to the danger of the lieges.[2] The punishment is penal servitude, imprisonment, or fine, according to the degree of culpability. Reckless and negligent driving of motor vehicles is usually prosecuted under the Motor Car Act, 1903,[3] but where there is danger to the lieges the accused may be charged at common law.

(*b*) Crimes relating to Sex.

Subsection (13).—*Introductory.*

301. The main group of crimes under this head consists of crimes against chastity. Rape is the leading crime and consists in the carnal knowledge of a woman forcibly and against her will, or of a girl below twelve irrespective of force or consent. The Criminal Law Amendment Acts of 1885 and 1922 have, however, made the law more stringent and seek to protect the chastity of girls up to the age of sixteen. These Acts have also created statutory crimes in certain cases such as procuring defilement by threats, fraud, or administration of drugs where the circumstances do not amount to rape. These Acts also deal with brothels, procuration, and suchlike subjects. These topics will be discussed below.[4]

Subsection (14).—*Rape.*[5]

302. Rape is the carnal knowledge of a woman forcibly and against her will, or even without force in the case of a female under twelve [6] or of an idiot.[7] By statute, connection with a woman obtained by personating her husband is rape.[8] Penetration to any extent, however slight, is sufficient to constitute the crime, though there be no emission or rupture.[9] Violent connection with any woman is rape, except in

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[1] Hume, i. 192; Macdonald, p. 194; Anderson, p. 143; *H.M. Adv.* v. *Calder*, 1877, 3 Coup. 494.

[2] *M'Allister* v. *Abercrombie*, 1907 S.C. (J.) 95; 5 Adam 366.

[3] 3 Edw. VII. c. 36.

[4] Para. 341, *infra*.

[5] Hume, i. 301–311; Alison, i. 209–227; Bell's Notes, 82–86; Macdonald, pp. 166–168; Glaister, Medical Jurisprudence, p. 495 *et seq.*; Anderson, p. 161.

[6] But see Criminal Law Amendment Act, 48 & 49 Vict. c. 69, s. 4.

[7] Hume, i. 301 *et seq.*; Alison, i. 209.

[8] Criminal Law Amendment Act, s. 4; *H.M. Adv.* v. *Montgomery*, 1926, J.C. 2.

[9] *Robertson*, 1836, 1 Swin. 93; cases referred to in Bell's Notes, 82, 83.

case of husband and wife, and a husband may be guilty as accessory of the rape of his wife.[1] A prostitute may be ravished, though in that case stronger proof of violence is required.[2] There is no restriction as to the age at which a boy may commit rape. A boy under fourteen has been convicted.[3]

303. The force necessary is the overcoming of resistance, whatever the means employed, including the overpowering of the woman's will, though without actual personal violence, *e.g.* drugging her into insensibility, threatening her life with a dangerous weapon, or stupefying her by blows.[4] Taking advantage of a woman while asleep is not rape, though it is an indictable offence, and is commonly known as "clandestine injury to women."[5] The resistance offered by the woman must be shown to have endured to the last, until actually overpowered by sheer force, exhaustion, the fear of death, or unconsciousness.[6] This is not required where the woman is physically incapable of resistance. Females below twelve, and idiots, are regarded as incapable of consent, and the mere fact of penetration is therefore enough. In cases of weakness of mind, though not amounting to idiocy, a much less degree of opposition is required than in the case of ordinary adult women.[7] In one case where the woman was shewn to be of weak intellect the Court did not allow her to be examined as a witness for the prosecution.[8] How far evidence of the woman's unchastity is admissible will be found discussed in the case of *Dickie*.[9]

304. A previous conviction of any crime inferring personal violence, or lewd, indecent, or libidinous conduct, would be an aggravation.[10] A charge of rape can be tried only before the High Court of Justiciary. Under s. 9 of the Criminal Law Amendment Act, 1885, a pannel charged with rape may be convicted of an offence under that Act although the Act is not set forth in the indictment.[11] But where the offence libelled is attempted rape, the Act does not apply.[12] The offence was by statute capital (Act 1612, c. 4) until the Criminal Procedure Act, 1887, s. 56. The punishment now usually imposed is penal servitude for a long term or for life.[13] The offence is bailable.[14]

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[1] Hume, i. 306.
[2] Hume, i. 304; *Yates*, 1851, J. Shaw 528.
[3] *Fulton* 1841, 2 Swin. 564.
[4] *Mackenzie*, 1828, Syme 323; *Fraser*, 1847, Ark. 280; *Sweenie*, 1858, 3 Irv. 109.
[5] *Sweenie, supra*; *H.M. Adv.* v. *Thomson*, 1872, 2 Coup. 346.
[6] Hume, i. 302.
[7] *M'Namara*, 1848, Ark. 521; *Clark*, 1865, 5 Irv. 77.
[8] *H.M. Adv.* v. *Black*, 1887, 1 White 365.
[9] *Dickie* v. *H.M. Adv.*, 1897, 24 R. (J.) 82; 2 Adam 331.
[10] Criminal Procedure Act, 1887, ss. 64, 65; Macdonald, p. 168.
[11] *H.M. Adv.* v. *Watson*, 1885, 13 R. (J.) 6; 5 Coup. 696; *H.M. Adv.* v. *M'Laren*, 1897, 25 R. (J.) 25; 2 Adam 395.
[12] *Townsend* v. *H.M. Adv.*, 1914 S.C. (J.) 85; 7 Adam 378.
[13] The sentence in one case, where there was a recommendation to "the utmost leniency," was twelve months' imprisonment (*H.M. Adv.* v. *Davidson*, 1887, 1 White 535).
[14] 51 & 52 Vict. c. 36, s. 2.

SUBSECTION (15).—*Assault with Intent to Ravish.*

305. Assault with intent to ravish[1] has been held to be a distinct species of crime.[2] But it is not clear from the authorities whether it ought not rather to be regarded as an aggravation of assault. This is the view apparently underlying the case of *Kennedy*,[3] where under an indictment charging assault, especially "when committed with intent to ravish," it was held competent for the jury to return a verdict of "guilty of the assault as libelled without the aggravation." The result seems to be that if the prosecutor wishes to leave open the possibility of a conviction for simple assault as an alternative, he must be careful to base his indictment on assault charging the intent as an aggravation and not on assault with intent to ravish as a specific crime. It may be a crime to be present when the assault is committed and not to interfere or call for assistance.[4]

SUBSECTION (16).—*Offences under the Criminal Law Amendment Acts, 1885 and 1922.*[5]

306. The principal Act makes it an offence punishable by two years' imprisonment: To procure or attempt to procure (1) a female under twenty-one years of age, not being a prostitute or of known criminal character, to have unlawful intercourse with any person anywhere; (2) any female to become a common prostitute; (3 and 4) any female to leave the United Kingdom, or to leave her usual place of abode in the United Kingdom, in order to become the inmate of a brothel (s. 2): and also (1) By threats or intimidation to procure or attempt to procure any female to have unlawful connection; (2) by false pretences or false representations to procure any female, other than a prostitute or a person of known criminal character, to have unlawful connection; (3) to administer to any female any drug, matter, or thing with intent to stupefy or overpower, so as thereby to enable any person to have unlawful connection with such female (s. 3).

307. Under s. 4 of the principal Act, unlawful carnal knowledge of a girl under thirteen is a crime; whether she gives her consent or not is quite immaterial.[6] By the common law of Scotland the age of consent is twelve. To have intercourse with a girl under that age is rape. Sec. 4 of the Act, without using the word rape, provides the same punishment as for rape when the girl is under thirteen. On the other hand, an attempt to have carnal knowledge of a girl under thirteen

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[1] Macdonald, p. 156; see also Hume, i. 308; Alison, i. 184.

[2] Per Lord Deas in *H.M. Adv.* v. *Allan*, 1870, 1 Coup. 468.

[3] *H.M. Adv.* v. *Kennedy*, 1871, 2 Coup. 138; see also *Mitchell* v. *M'Watt*, 1871, 2 Coup. 13.

[4] *H.M. Adv.* v. *Kerr and Ors.*, 1871, 2 Coup. 334.

[5] 48 & 49 Vict. c. 69, as amended by 12 & 13 Geo. V. c. 56. On the Acts generally, see Russell on Crimes, 8th ed., p. 908 *et seq.*

[6] See 1922 Act, s. 1.

is punishable under the statute by a term not exceeding two years, whereas by the common law such an attempt on a girl under twelve may be punished with penal servitude. Juvenile offenders under this section may be whipped and sent to a reformatory.[1]

308. Under s. 5 of the principal Act it is declared to be a crime punishable by imprisonment not exceeding two years to have carnal connection with any girl between the ages of thirteen and sixteen.[2] Consent of the young person is no defence.[3] Prosecutions under this part of the section must be commenced within nine months [4] of the commission of the offence. Apprehension on a warrant and the emission of a declaration by the accused constitute a commencement of proceedings.[5] Repeated acts are not regarded as making the offence a *crimen continuum*, so as to make relevant a charge extending over a period of time reaching beyond the statutory period.[6] Under the principal Act it was a sufficient defence if it should be made to appear to the Court or jury that the accused had reasonable cause to believe that the girl was of or above the age of sixteen years, but under the amending Act of 1922 this defence is open only to a man of twenty-three years of age or under, and only on the first occasion on which he is charged with an offence under this section. It is thought that the provision with reference to the "Court" is meant to suit the case of summary trial without a jury. The question what is reasonable cause is one for the jury. It is not enough that the girl looks as if she might be over sixteen.[7] The girl is not liable to prosecution as an accessory to the offence.[8] Under this section a like penalty is provided against unlawful connection with any female idiot or imbecile under circumstances which do not amount to actual rape, but which prove that the offender knew at the time of the commission of the offence that the woman was an idiot or imbecile.

309. The Act next (s. 6) provides the same penalties, in the case of girls under thirteen and sixteen respectively, as are imposed for the offence of having connection with them, upon any person who induces or allows the girl to resort to his or her premises for the purpose of such unlawful connection. It was held that the offence was committed although the girl was the daughter of the accused, and the premises the girl's home, where she resided with the accused.[9]

310. Any person who, without any reasonable cause to believe that the girl is of or above the age of eighteen, takes a girl under eighteen out of the custody of her father or mother, or any other person having the lawful care or charge of her, for the purpose of unlawful connection,

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[1] 1922 Act, s. 4; Children Act, 1908 (8 Edw. VII. c. 67), ss. 57, 134.
[2] *H.M. Adv.* v. *Watson*, 1885, 13 R. (J.) 6; 5 Coup. 696.
[3] 1922 Act, s. 1.
[4] 1922 Act, s. 2.
[5] *M'Arthur* v. *H.M. Adv.*, 1902, 10 S.L.T. 310.
[6] *H.M. Adv.* v. *Philp*, 1890, 2 White 525.
[7] *H.M. Adv.* v. *Hoggan*, 1893, 1 Adam 1; *H.M. Adv.* v. *Macdonald*, 1900, 3 Adam 180.
[8] *Reg.* v. *Tyrrell*, [1894] 1 Q.B. 710; Russell on Crimes, 8th ed., p. 913.
[9] *Reg.* v. *Webster*, 1885, 16 Q.B.D. 134.

is made liable to two years' imprisonment (s. 7). But it is an offence under the statute only if the intention was that the girl should be unlawfully known.[1] A like penalty is imposed (s. 8) upon any person who detains a girl against her will upon any premises for the purpose of unlawful connection, or in any brothel. Such detention is to be inferred from the withholding from the girl of clothes with which to leave, or threatening her with legal proceedings if she takes away clothes with which she has been supplied. No legal proceedings, civil or criminal, are to be taken against any woman for taking away such apparel as was necessary to enable her to leave a brothel. A power is conferred upon magistrates of granting a search-warrant where there is reasonable cause to suspect that a woman or girl is being unlawfully detained for immoral purposes (s. 10). Under a charge of rape the jury may convict of an offence under the Act although the Act is not libelled.[2]

SUBSECTION (17).—*Lewd, Indecent, and Libidinous Practices.*[3]

311. Filthy and indecent conduct is usually libelled as "lewd, indecent, and libidinous practices." If practised upon children, such conduct is criminal, though there be no assault. Instances of this offence are: exposure of the person before young girls, or indecently handling them [4] or inducing children to commit indecencies.[5] In the case of females above twelve years of age there is no crime, unless there be assault,[6] except under the Criminal Law Amendment Act.[7] But if a woman is of weak intellect, it is thought that she may be regarded as a child in such cases.[8] There is no limitation of age in the case of boys.[9] If the boy is old enough to give an intelligent consent to the indecency, he will be regarded as art and part in the crime. Indecencies between males may now be prosecuted under the Criminal Law Amendment Act.[10] Exposure of the person, to amount to a crime, must be libelled as having been to the annoyance of particular persons, who must be named in the charge.[11] The part of the person exposed must be libelled.[12] But such specification is not required in a prosecution under the Summary Jurisdiction Act, 1908.[13] It is regarded as an aggravation of such offences that the parties were in such relation to each other as that of teacher and pupil,[14] or nurse and children in her charge. It is also an aggravation if venereal disease is communicated to the child.[15]

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[1] *Abinet* v. *Fleck*, 1894, 2 S.L.T. 30.
[2] See para. 304, *supra*.
[3] Macdonald, p. 204; Anderson, p. 97; Hume, i. 309; Alison, i. 225.
[4] *MacKenzie* v. *White*, 1864, 4 Irv. 570.
[5] *M'Lean*, 1838, Bell's Notes, 86.
[6] *Philip*, 1855, 2 Irv. 243.
[7] Para. 306 *et seq.*, *supra*.
[8] *Philip, supra*; *M'Namara*, 1848, Ark. 521; *Clark*, 1865, 5 Irv. 77.
[9] *Philip, supra*; *Brown*, 1844, 2 Broun 261; *Lyall*, 1853, 1 Irv. 218.
[10] 48 & 49 Vict. c. 69, s. 11; *Clark* v. *Stuart*, 1886, 1 White 191.
[11] *Smyth*, 1819, Shaw (Just.) 2; *Thomson*, 1831, Bell's Notes, 86; *Mackenzie*, *supra*.
[12] *Carlin* v. *Malloch*, 1896, 23 R. (J.) 43; 2 Adam 98; *Harper* v. *Neilson*, 1898, 1 F. (J.) 1; 2 Adam 582.
[13] *Poli* v. *Thomson*, 1910 S.C. (J.) 98; 6 Adam 261.
[14] *Brown*, *supra*.
[15] *Mack*, 1858, 3 Irv. 310.

SUBSECTION (18).—*Procuring Abortion.*[1]

312. It is a crime to use means causing a woman to abort, unless it be done for a necessary reason, such as to save the woman's life when she cannot be delivered of a full-grown child, or for other sufficient medical reason. The woman herself may incur criminal responsibility if she be a willing participator in what is done. The cases which have been prosecuted are cases either of administering drugs, or of using instruments within the body. The administration of such drugs, or such use of instruments, with criminal purpose, is an offence although the attempt be unsuccessful.[2] It is an undecided point whether a woman who, without any accomplice, takes drugs for the purpose of causing herself to abort, can be relevantly charged with crime for doing so.[3] But there seems to be no good reason for holding that a relevant charge cannot be made. If a woman commits a crime in allowing another to do acts for the purpose of causing her to abort, it is not easy to see why the same act done by herself should not be held criminal. The punishment is either penal servitude or imprisonment. If in procuring abortion the life of the woman is lost, the crime is murder.[4]

(*c*) CRIMES RELATING TO CHILDREN.

SUBSECTION (19).—*Child-Murder.*[5]

313. There is no difference in degree between the murder of a child and the murder of an adult. In both cases, if the guilt of the pannel is established, the punishment is death. If the child is not completely born, the destruction of it, though criminal, is not homicide. If, however, the child has breathed, it is homicide if it is killed, although the killing has taken place before the child is completely out of the body of the mother.[6]

314. The pannel in a child-murder trial is, in the majority of cases, the mother of a child which had been born illegitimate. The shame of her position not infrequently leads the mother of a bastard to lay violent hands on her offspring. The mode in which the destruction of the child has been accomplished frequently determines whether the crime amounts to murder or is only culpable homicide.

The circumstances may point to the absence of that wilfulness or recklessness which characterises the crime of murder. Thus it is only culpable homicide if the child is suffocated at its birth, through the mother making no preparations for, and calling for no assistance at the birth, although she did not conceal the fact that she was pregnant.[7]

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[1] Hume, i. 186; Alison, i. 629; More, ii. 373; Macdonald, p. 152; Anderson, p. 156.
[2] *Reid*, 1858, 3 Irv. 235. [3] *Webster*, 1858, 3 Irv. 95.
[4] Hume, i. 263, 264; Alison, i. 52; Macdonald, p. 125; *Reid, supra; H.M. Adv.* v. *Rae*, 1888, 15 R. (J.) 80; 2 White 62.
[5] Hume, i. 186, 189, 237, 291, 298; Alison, i. 71; More, ii. 360; Macdonald, pp. 133, 138, 173. [6] See para. 258, *supra*; *H.M. Adv.* v. *Scott*, 1892, 3 White 240; 19 R. (J.) 63.
[7] *H.M. Adv.* v. *Martin*, 1877, 3 Coup. 379.

In another case a verdict of culpable homicide was returned where the accused had carelessly folded up a bed in which a child was lying, and caused its death, although the jury affirmed that she did not know, when she folded up the bed, that the child was in it.[1] Suffocation of an infant under three years by overlying is dealt with in the Children Act, 1908,[2] as neglect where the person in bed with the child is under the influence of drink.

315. An important consideration, as bearing upon the quality of the crime committed, is the state of the pannel's mind at the time of the child's death.[3] In the case of *Abercrombie*,[4] where a woman was indicted for the murder of her illegitimate child, by choking it immediately after its birth, Lord M'Laren, in charging the jury, said: "It is of course a characteristic of every case of confinement, and I suppose in a special degree of the first confinement of a woman, that it is a period of very acute suffering, and you will have to consider this case not only in a question of guilty or not guilty, but the question also arises whether this is to be treated as a case of murder or of culpable homicide. It is a perfectly legitimate topic of consideration that, according to the evidence, the act was done immediately after delivery, and apparently without premeditation, at a time when the woman would be experiencing acute physical suffering, when she was alone and without assistance, and had apprehensions as to the disclosure of her condition; and that she may have been guilty of an attack upon the person of her child, which was illegal and criminal, and yet may have done so without realising an intention of taking the life of the child."

Subsection (20).—*Concealment of Pregnancy.*[5]

316. The frequency of child-murder in the seventeenth century, and the difficulty of proving this crime at common law, led to the passing of the Act 1690, c. 21. Under this statute, if certain *indicia* were proved, the jury were entitled to presume that the crime of child-murder had been committed, and were empowered to convict accordingly. The penalty of death imposed by this statute was mitigated by the Act of 1809,[6] which, however, authorised conviction on proof of the same *indicia* as had to be established under the provisions of the Act of 1690. The presumptive crime, which, under the earlier statute, was murder, was reduced, by the later Act, to culpable homicide. The Act of 1809 provides that if a woman "shall conceal her being with child during the whole period of her pregnancy, and shall not call for or make use of help or assistance in the birth; and if the child shall be found dead or be amissing, the mother, being lawfully convicted thereof, shall be

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[1] *H.M. Adv.* v. *Scott, supra; Sutherland*, 1856, 2 Irv. 455.
[2] 8 Edw. VII. c. 67, s. 13.
[3] See para. 263, *supra*.
[4] *H.M. Adv.* v. *Abercrombie*, 1896, 23 R. (J.) 80; 2 Adam 163.
[5] Hume, i. 298; Alison, i. 157; Macdonald, p. 147; Anderson, p. 157.
[6] 49 Geo. III. c. 14.

imprisoned for a period not exceeding two years." The Act is applicable to married women as well as unmarried. No charge of art and part can be admitted under the Act. The mother of the child is the only person who can be guilty, she being, by the very nature of the charge, "the one person in the world that is conscious of the birth." [1]

317. The statute requires from the prosecutor proof of three *indicia*, after which he is entitled to ask the jury to hold that the statutory crime has been committed.

1. He must prove that the woman was pregnant, and that she concealed this fact during the whole period of pregnancy. If the dead child is found, it must be established that the accused is the mother. If the child is amissing, the fact of pregnancy will be established by physical signs of recent delivery, and by the evidence of those who noticed the woman's condition prior to the supposed date of the birth. But the prosecutor has further to prove that the accused concealed her state during the whole period of pregnancy, and even till the death of the child, if it was born alive and subsequently died. If she disclosed her condition during this period, then this part of the statute is elided. It is enough that this disclosure is made to one person only, even although that person is the father of the child.[2] The disclosure requires neither to be voluntary nor explicit. It may have been made under some constraint, as to a kirk-session. The disclosure is probably sufficient although made with the intention of obtaining aid in concealing the fact from others and getting rid of the child.[3] The disclosure may be made by conduct or by admissions, which, though not positive, yet amount to a confession. Thus if a woman makes no effort to hide her condition, and openly engages in making clothing for the child, this seems to be a sufficient disclosure.[4] And the woman may disclose her pregnant condition even by the mode of her denial of its existence.[5] Disclosure at any period of the pregnancy, however early that may be, is sufficient. The prosecutor is not bound to prove that the pregnancy lasted for the full period.[6] All that is necessary is to shew that pregnancy continued long enough to make a live birth possible.[7] It is, however, in favour of the accused if her labour was premature; but it is no defence that the child was still-born, as this result may have been due to the conduct of the accused in concealing her condition and failing to procure aid at the birth.[8]

2. The prosecutor has next to prove that the woman failed to call for or make use of help at the birth.[9] If the woman *bona fide* call for

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[1] Hume, i. 299; Alison, i. 158.
[2] Hume, i. 295; *Kiellor*, 1850, J. Shaw 576; *Gall*, 1856, 2 Irv. 366.
[3] Macdonald, p. 148 *et seq.*
[4] Alison, i. 156; Burnett, p. 572 n.
[5] *Skinner*, 1841, Bell's Notes, 80.
[6] Hume, i. 297; *Brown*, 1837, 1 Swin. 482; *Punton*, 1841, 2 Swin. 572; Bell's Notes, 80.
[7] Hume, i. 298; Alison, i. 153; *Fallon*, 1867, 5 Irv. 367.
[8] *Punton, supra*; Macdonald, p. 151.
[9] Hume, i. 297; Alison, i. 157.

help, this is enough to elide the statute, although assistance is not obtained in time for the delivery. If she obtains help in time, the statute is elided.

3. The prosecutor must also prove either that the child has been found dead or that it is amissing.

318. The Criminal Procedure Act of 1887 [1] gives this form of indictment: "You were delivered of a child, now dead or amissing, and you did conceal your pregnancy and did not call for or use assistance at the birth, contrary to the Act 49 Geo. III. c. 14." . . .

This form of charge is open to the adverse criticism which Hume makes against the practice of libelling the death or absence of the child alternatively. The prosecutor must always know whether the child has been found dead or is amissing. Hume adds that neither of the statutes has given the prosecutor any dispensation in this respect, "but the command only of two grounds of accusation, either of which he may employ, as the case happens to be." The maximum penalty under the statute is imprisonment for two years.

Subsection (21).—*Abandoning Child.*

319. To leave an infant exposed is a crime; and if death be caused it constitutes culpable homicide,[2] or, it may be, murder.[3] It is criminal to expose a child to danger even though there be no desertion. Abandoning or exposing a child is now a statutory crime and offence.[4] If any person over sixteen years of age, who has the custody or care of a child or young person (*i.e.* a person over fourteen and under sixteen), abandons or exposes the child or young person, or causes or procures this to be done in a manner likely to cause unnecessary suffering or injury to health, he is liable (*a*) on conviction on indictment to a fine not exceeding £100, and, in default or addition thereto, to imprisonment with or without hard labour for a term not exceeding two years; and (*b*) on summary conviction, to a fine of £25 and imprisonment, as above, for a term not exceeding six months (s. 12).

Subsection (22).—*Cruelty to Children: Proper Care of Children.*

320. Offences involving cruelty to children have been the subject of various statutes. The leading statute is the Prevention of Cruelty to Children Act, 1904.[5] As to the proper care and protection of children elaborate provisions are made in the Children Act, 1908.[6] See Children and Young Persons.[7] Neglect and bad treatment of a child is a good charge at common law.[8]

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[1] 50 & 51 Vict. c. 35, Sched. A.
[2] Hume, i. 299; Alison, i. 162; Macdonald, p. 173; Anderson, p. 171.
[3] *Kerr*, 1860, 3 Irv. 645.
[4] Children Act, 1908, 8 Edw. VII. c. 67.
[5] 4 Edw. VII. c. 15. [6] 8 Edw. VII. c. 67. [7] Vol. III, p. 298, *ante*.
[8] *H.M. Adv.* v. *M'Intosh*, 1881, 8 R. (J.) 13; 4 Coup. 389.

(*d*) Crimes involving Injury to Reputation, Loss of Liberty, etc.

Subsection (23).—*False Accusation.*[1]

321. To render a false accusation against a private person criminal, it must be of the most serious nature, such as an imputation of gross immorality, or a false charge of committing crime. It is criminal for several persons to conspire to make false accusations against anyone.

The punishment is penal servitude or imprisonment.

Subsection (24).—*Threats.*[2]

322. It is criminal to threaten, either verbally or by letter, to do serious injury to person or property. It is also a criminal offence to threaten to accuse a person of crimes or immoral offences. The person who utters threats against another usually does so with the object of extorting money from the person threatened. It is enough, however, that the purpose of the threat is to alarm the person threatened.[3] The usual mode by which the threat is communicated is by threatening letters, signed or unsigned.[4] The crime is complete when the letter is despatched, though it never reach the person for whom it was intended.[5]

323. If the object of the threat is to blackmail [6] or concuss, it is no defence to urge that the money demanded was justly due.[7] It is immaterial that the threats made have produced no effect on the person threatened.[8] In the case of a letter threatening to accuse of crime, it is no defence to offer to prove the truth of the contents of the letter. The prosecutor, accordingly, is not bound to disprove accusations made by the accused,[9] and it is incompetent for the accused to prove the *veritas convicii* either in justification or extenuation of his crime.[10] It has not been decided whether it would be criminal to threaten with exposure a person who was living an immoral life, with the object of extorting money from him, or whether in such a case it is competent to prove *veritas*.[11]

324. The crime of uttering threats is aggravated if the object is to prevent the giving of true evidence,[8] or revenge for information given to the authorities,[12] or to intimidate electors,[13] or masters, or workmen.[14]

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[1] Hume, i. 341; Alison, i. 575; Macdonald, pp. 179, 245; Anderson, p. 164.

[2] Hume, i. 135; Alison, i. 443; More, ii. 404; Macdonald, p. 176; Anderson, p. 164.

[3] *Miller*, 1862, 4 Irv. 238.

[4] *Ledingham*, 1842, 1 Broun 254; *Smith*, 1846, Ark. 4; see also *Ross*, 1844, 2 Broun 271.

[5] *Hunter*, 1838, Bell's Notes, 111.

[6] Blackmail has now no technical legal meaning; it is merely a term in popular use. Formerly in Scotland it meant the contributions of money paid by owners of land to protect themselves from rievers. See Hume, i. 476 *et seq.*

[7] *Crawford*, 1850, J. Shaw 309; *H.M. Adv.* v. *Macdonald*, 1879, 4 Coup. 268.

[8] *H.M. Adv.* v. *M'Daniel*, 1876, 3 Coup. 271.

[9] *Crawford, supra.*

[10] *M'Ewan*, 1854, 1 Irv. 520.

[11] *Cf.* Lord Justice-Clerk Hope in *Crawford, supra.*

[12] *Ross, supra.*

[13] See 17 & 18 Vict. c. 102, s. 5.

[14] See 9 Geo. IV. c. 129; 22 Vict. c. 34; and 38 & 39 Vict. c. 86.

It is also a grave offence to threaten judges or magistrates in reference to their official duties.[1]

Subsection (25).—*Abduction.*[2]

325. This crime consists in the forcible carrying off or confinement of any person without lawful authority. The crime may be aggravated by its purpose, as, for example, to compel a woman to marriage, or to perpetrate a rape, or to affect the administration of justice, as by preventing a witness from attending a Court to give evidence. The carrying off of a voter for the purpose of affecting an election is a crime at common law; it is also punishable under the Corrupt Practices Acts.[3] It is not necessary that there should be any special purpose. Malicious intention, although not connected with any special cause, is sufficient, and such malice will be presumed from the act itself. Under the Criminal Law Amendment Act, 1885,[4] it is a crime (punishable by imprisonment not exceeding two years with or without hard labour) to take any unmarried girl under eighteen years of age out of the possession and against the will of her father and mother or any other person having the lawful care or charge of her, with intent that she should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally.

Section 7.—Crimes against Decency and Morality.

Subsection (1).—*Bigamy.*[5]

326. This crime consists in the felonious contracting of a second marriage during the subsistence of a prior one. Bigamy is criminal both by statute and at common law. By the Act 1551, c. 19, it is provided that "whatsumever person marries twa sindrie wivis, or woman marries twa sindrie husbands, livand together, undivorced lawfully, contrair to the aith and promise maid at the solemnization and contracting of the matrimony, and swa are of the law perjured and infamous, therefore, that the pains of perjuring be execute upon them with all rigour." The statute sets forth what the pains of perjury are: "That is to say, confiscation of all their gudes movable, warding of their persons for yeir and day, and langer during the Queene's will, and as infamous persons, never able to bruick office, honour, dignitie, nor benefice in time to cum." This Act had reference to a time when all marriages were celebrated by a formal and regular solemnisation. The essence of the crime, in the view of the statute, consisted in the violation of this solemn vow, and so it was

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[1] See para.220, *supra.*

[2] Hume, i. 310; Alison, i. 642; Macdonald, p. 171.

[3] *Douglas,* 1866, 5 Irv. 265. The Courts of the locus from which a voter has been abducted have jurisdiction to try the case although the abduction carried the person outside the bounds of that jurisdiction. Macdonald, p. 255.

[4] 48 & 49 Vict. c. 69, s. 7; see para. 310, *supra.*

[5] Hume, i. 459; Alison, i. 535; Macdonald, p. 200; Anderson, p. 93.

appropriately punished, as a religious offence, by the pains of perjury. The crime is now prosecuted at common law. It is essential to bigamy that there have been two marriages.

327. As to the form of the marriages Alison says,[1] and Hume appears to think,[2] that both marriages must have been formal and regular. This is erroneous; and it is now clearly settled that neither marriage need be regular.[3] Prior to the cases cited, it had been decided that non-proclamation of banns in the case of a second marriage duly celebrated by a clergyman was no defence to a charge of bigamy, and a conviction followed.[4] It has, however, not been settled whether it is sufficient that a marriage has been constituted by habit and repute or by promise *subsequente copula*.[5] Hume thinks [6] that if the cohabitation has been long-continued, and of universal repute, this might be sufficient. It is thought that a written acknowledgment of marriage would suffice.[7]

328. As to the other qualities of the marriages: (*a*) The first marriage must be lawful. If the parties are within the forbidden degrees of relationship, the marriage is illegal, and will not support a charge of bigamy. (*b*) The first marriage must be subsisting at the date of the second marriage. If decree of divorce has been pronounced before the second marriage has been contracted, this forms a good defence to a charge of bigamy. It is not enough, however, that divorce proceedings have been instituted. If the decree of divorce, founded on in defence, is afterwards set aside, this does not invalidate the defence, unless it has been set aside on the ground of corruption or fraud. It is a good defence if the accused establishes that he had reasonable grounds for believing that the other spouse was dead at the date of the second marriage.[8] It is probable that an averment that the other spouse is impotent would be held to be a relevant defence to a charge of bigamy.[9] (*c*) The second marriage need not be lawful. Thus the charge of bigamy will lie though the second union is an incestuous one.

329. If the second wife (or husband) is aware that the second union is a bigamous one, she (or he) as being art and part is liable to be punished with the pains of bigamy. So, too, are the priest who performs the marriage ceremony and the witnesses who are present, provided that they have knowledge that the marriage is bigamous.

330. As regards proof of bigamy, the prosecutor must prove the first marriage. The proof of this marriage, whether the marriage is regular or irregular, is *prout de jure*, and the best evidence must be adduced.

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[1] i. 536. [2] i. 459.

[3] *Brown*, 1846, Ark. 205 (first marriage irregular); *Sharpe*, 1843, 1 Broun 568 (second marriage irregular); *Thorburn*, 1844, 2 Broun 4 (second marriage irregular); *Purves*, 1848, J. Shaw 124 (second marriage irregular, but followed by regular ceremony); *Langley*, 1862, 4 Irv. 190 (both marriages irregular).

[4] *M'Lean*, 1836, 1 Swin. 278.

[5] See *Armstrong*, 1844, 2 Broun 251; *Langley, supra.* [6] i. 461.

[7] Macdonald, p. 201; *Braid*, 1823, Shaw (Just.) 98. [8] *Macdonald*, 1842, 1 Broun 238.

[9] Hume, i. 461; More, ii. 415; Fraser, H. & W. i. 79; *Masterton*, 1837, 1 Swin. 427; Macdonald, p. 202 and note.

The first wife is an incompetent witness against the husband, but after the first marriage has been established the second wife's evidence is competent. The prosecutor's case is complete, and guilty knowledge on the part of the accused will be inferred, after it has been established that a first marriage took place, that the spouse of the accused is still alive, and that a second marriage has been contracted. The onus is then upon the pannel of shewing either that the earlier contract has been dissolved, or that there were, at the date of the second marriage, reasonable grounds for such a belief.

331. If the case presents no serious features, the Sheriff will dispose of it, and, it may be, will do so in his summary Court. If the circumstances are specially reprehensible, the case will be dealt with in the High Court of Justiciary. As bigamy is now invariably prosecuted at common law, the punishment is arbitrary, varying, according to the nature of the case and the powers of the tribunal dealing with it, from fine or imprisonment to penal servitude.[1]

Subsection (2).—*Incest.*[2]

332. Incest is the crime of carnal intercourse between persons within the degrees of relationship set forth in the eighteenth chapter of Leviticus. This portion of the Mosaic law was embodied in the law of Scotland by the Act 1567, caps. 14, 15. The passage is to be read, not in the Hebrew, but in the Geneva Bible.[3]

333. The following are the forbidden degrees enumerated in Leviticus (chap. xviii. 14 *et seq.*): Parent and child; step-parent and step-child; parent-in-law and child-in-law; grandparents and grandchildren ; and, by construction, ascendants and descendants of remoter degree;[4] husband and granddaughter of his wife; wife and grandson of her husband; brother and sister; half-brother and half-sister; uncle and niece;[5] aunt and nephew; and, by construction, granduncles and grandnieces, grandaunts and grandnephews;[6] nephew and uncle's wife; niece and aunt's husband; man and brother's wife; (it is doubtful whether connection between a man and his brother's widow is incestuous.[7] Hume mentions a case in which it was held to be so.[8] But intercourse between a man and his brother's wife during his brother's lifetime is

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[1] Macdonald, p. 200 ; Anderson, p. 90.

[2] Hume, i. 448 ; Alison, i. 565 ; Macdonald, p. 202 ; Anderson, p. 95 ; More, ii. 414 ; Fraser, H. & W. i. 113.

[3] *Fenton* v. *Livingstone*, 1861, 23 D. 366, at p. 382; *Sol.-Gen.* v. *A. B.*, 1914 S.C. (J.) 38, at p. 41. See these two cases for construction of the statute and the passage in Leviticus generally.

[4] Fraser, H. & W. i. 117.

[5] *Stewart and Wallace*, 1845, 2 Broun 544; Fraser, H. & W. i. 117; *H.M. Adv.* v. *Aikman*, 1917 S.C. (J.) 8.

[6] Fraser, H. &. W. i. 119.

[7] Deut. xxv. 5; Fraser, H. & W. i. 121; Lord Dundas in *Sol.-Gen.* v. *A. B.*, 1914 S.C. (J.) 38.

[8] Hume, i. 449.

criminal.[1] Intercourse with a wife's sister while the wife is still alive is not criminal;[2]) woman and sister's husband;[3] wife and husband's brother's or sister's son; husband and wife's brother's or sister's daughter; by construction this is extended to the grandchildren of the spouse's brother or sister.[4] Hume refers to a case [5] where connection between a husband and his wife's niece was held relevant to infer only an arbitrary punishment. Hume mentions the following additional cases which have occurred in practice: Widower and the daughter of his wife's brother in half blood;[6] husband and the sister of his wife's mother.[7]

At one time it was held that intercourse between a man and two sisters, or a woman and two brothers, where there was no marriage, was incestuous; but this would not be held now. The only case in which a bastard can have incestuous connection is with his mother; but it has not been expressly decided that this is incest.

334. There must have been actual connection between the parties to constitute the crime of incest.[8] But attempt to commit incest is a relevant charge, both at common law [9] and by statute.[10] The parties must have known that they were related within the forbidden degrees; but, if the crime is established, the onus of disproving presumed relationship is thrown on the accused.[11] If both parties are *puberes*, both are guilty of the crime, and one of the parties, if beyond pupillarity, cannot be adduced as a witness against the other, unless he or she has been charged with the crime, and accepted by the Crown as King's evidence.[12] The punishment of incest under the Act of 1567 is death. The penalty is now imprisonment or penal servitude.

Subsection (3).—*Brothel-keeping.*[13]

335. This is an offence at common law.[14] During the century subsequent to the Reformation, women convicted of keeping such houses were dealt with summarily by magistrates, and also in some places by kirk-sessions, and were punished by ducking, whipping, banishment from the town, and other indignities. The offence is now dealt with by statute.

336. The Criminal Law Amendment Act, 1885,[15] contains certain provisions against the keeping of brothels. It is (1) a crime and offence

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[1] *H.M. Adv.* v. *Ryan*, 1914 S.C. (J.) 108; 7 Adam 404.

[2] *Sol.-Gen.* v. *A. B.*, 1914 S.C. (J.) 38; 7 Adam 306, overruling *Oman*, 1855, 2 Irv. 146.

[3] The effect of the statutes of 7 Edw. VII. c. 47 and 11 & 12 Geo. V. c. 24 on the point has not been fully considered; but see Lord Dundas in *A. B.*, *supra*.

[4] Fraser, H. & W. i. 75. [5] i. 450 (*Beatson*, 1692). [6] i. 450 (*Blair*, 1630).

[7] i. 450 (*Gourlay*, 1626). [8] Hume, i. 452; Alison, i. 566.

[9] *H.M. Adv.* v. *Russell*, 1869, 1 Coup. 441 n.; *H. M. Adv.* v. *Simpson*, 1870, 1 Coup. 437; *H.M. Adv.* v. *M'Coll*, 1874, 2 Coup. 538; 1 R. (J.) 22.

[10] Criminal Procedure Act, 1887, s. 61.

[11] Hume, i. 452; Alison, i. 565; More, ii. 414; Macdonald, p. 202.

[12] *H.M. Adv.* v. *A. E.*, 15 R. (J.) 62; 1 White 535.

[13] Anderson, p. 100. [14] 2 & 3 Geo. V. c. 20. [15] 48 & 49 Vict. c. 69.

for any person to procure or attempt to procure any woman or girl (*a*) to leave the United Kingdom, with intent that she may become an inmate of a brothel elsewhere; (*b*) to leave her usual place of abode in the United Kingdom, such place not being a brothel, with intent that she may, for the purposes of prostitution, become an inmate of a brothel within or without the King's dominions (s. 2). (2) A crime and offence for any person to detain any woman or girl against her will in any brothel, by withholding her clothes or otherwise (s. 8). (3) An offence for any person (*a*) to keep or manage, or aid or assist in the management of, a brothel; (*b*) being the tenant, lessee, or occupier of any premises, to knowingly permit such premises or any part thereof to be used as a brothel, or for the purposes of habitual prostitution;[1] (*c*) being the lessor or landlord, or the agent of the lessor or landlord, of any premises, to let the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or to be wilfully a party to the continued use of such premises or any part thereof as a brothel (s. 13). In construing these provisions, it has been held that a house where one woman receives men for the purposes of prostitution is not a brothel.[2] On the other hand, under a local Act which imposed a penalty upon the occupier of any building which he uses or knowingly suffers to be used for the purpose of harbouring prostitutes for the purpose of prostitution, a conviction was sustained where the keeper of the house was a prostitute and one other prostitute had been harboured.[3] Under the Criminal Law Amendment Act, the jurisdiction to try such offences is in the Sheriff, or, in regard to the more serious cases, in the High Court of Justiciary; but by the Burgh Police Act, 1892,[4] jurisdiction, under the Criminal Law Amendment Act, 1885, in so far as it relates to the suppression of brothels, is extended to Police Courts in burghs.

337. The Burgh Police Act, 1892, contains further provisions for the suppression of brothels. A power of granting search-warrants is conferred upon magistrates,[5] and any person convicted either of being the occupier of, or of managing or assisting in managing, a brothel, is liable to a penalty not exceeding £20 or sixty days, or imprisonment not exceeding sixty days without option. Such a conviction *ipso facto* terminates any lease of the premises, without prejudice to the landlord's claim for rent.

338. By the Prevention of Crime Act, 1871,[6] it is an offence for any person who occupies or keeps a brothel, to knowingly (*a*) harbour thieves or reputed thieves therein; (*b*) suffer thieves or reputed thieves to meet or assemble therein; (*c*) allow the deposit of goods therein, having a reasonable cause for believing them to be stolen. The penalty is a fine not exceeding £10, with imprisonment not exceeding two months in default of payment. Caution may also be required.

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[1] *Girgawy* v. *Strathern*, 1925, J.C. 31.
[2] *Singleton* v. *Ellison*, [1895] 1 Q.B. 607.
[3] *Milton* v. *M'Phee*, 1882, 10 R. (J.) 20; 5 Coup. 165.
[4] 55 & 56 Vict. c. 55, s. 431.
[5] *Ibid.*, s. 403.
[6] 34 & 35 Vict. c. 112, s. 11.

Subsection (4).—*Immoral Traffic.*

339. The Immoral Traffic (Scotland) Act, 1902,[1] makes provision for the punishment of persons trading in prostitution in Scotland. Every male person who knowingly lives wholly or in part on the earnings of prostitution, or in any public place persistently solicits or importunes for immoral purposes, is liable, on conviction before a summary Court, to be imprisoned for any term not exceeding three months with hard labour. Where a male person is proved to live with or to be habitually in the company of a prostitute, and has no visible means of subsistence, he shall, unless he can satisfy the Court to the contrary, be deemed to be knowingly living on the earnings of prostitution. If it is made to appear to a Court of summary jurisdiction by information on oath that there is reason to suspect that any house or any part of a house is used by a female for purposes of prostitution, and that any male person residing in or frequenting the house is living wholly or in part on the earnings of the prostitute, the Court may issue a warrant authorising any constable to enter and search the house and to arrest that male person.

Subsection (5).—*Sodomy.*[2]

340. Sodomy is unnatural intercourse between two males. The passive party, if consenting, is equally guilty with the assailant. The offenders may be prosecuted at common law or under the 11th section of the Criminal Law Amendment Act of 1885.[3] Attempt to commit the crime is punishable.[4] At one time this was a capital crime. The punishment now is penal servitude.[5]

Subsection (6).—*Bestiality.*[6]

341. Connection between a man and a lower animal is criminal. This offence was formerly capital, and it was held in such abhorrence that the sentence of death was generally executed in some unusual way. Erskine says [7] that "the ordinary punishment is burning." In the cases cited by Hume, the condemned were either drowned or strangled at a stake, the bodies of those who were strangled being afterwards burned. The crime is no longer capital,[8] but a long sentence of penal servitude would follow a conviction. Attempt to commit the crime was formerly a relevant charge at common law.[9] Attempts are punishable by an arbitrary sentence. It is now competent, where a completed crime has

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[1] 2 Edw. VII. c. 11; amended by Criminal Law Amendment Act, 1912 (2 & 3 Geo. V. c. 20); Anderson, p. 102; *Hall* v. *Macpherson*, 1913 S.C. (J.) 100; 7 Adam 173.
[2] Hume, i. 469; Alison, i. 566; Macdonald, p. 204; Anderson, p. 97.
[3] 48 & 49 Vict. c. 69.
[4] *Simpson*, 1845, 2 Broun 671; 50 & 51 Vict. c. 35, s. 61.
[5] 50 & 51 Vict. c. 35, s. 56.
[6] Hume, i. 469; Alison, i. 566; Macdonald, p. 204; Anderson, p. 97.
[7] iv. 4, 57.
[8] 48 & 49 Vict. c. 69, s. 56.
[9] *Pottinger*, 1835, 1 Swin. 5; *M'Givern*, 1845, 2 Broun 444.

been libelled,[1] to restrict the charge to that of an attempt, and also, whether the charge has been restricted or not, to convict of an attempt.

SUBSECTION (7).—*Obscene Works, Pictures, and Advertisements.*

342. It is an offence at common law to publish, vend, circulate, or to cause to be published, vended, or circulated, or to expose for sale any lewd, impure, gross, or obscene book, or printed work, or print, engraving, or representation, devised, contrived, and intended to vitiate and corrupt the morals of the lieges, and to raise and create in their minds inordinate and lustful desires.[2] The punishment is penal servitude or imprisonment. By statute [3] it is an offence to send indecent articles through the post, or to affix or inscribe upon buildings, etc., or deliver to any inhabitant or to any person in the street, or to exhibit in the window of any house or shop indecent or obscene pictures or printed or written matter.[4]

343. By the Burgh Police Act, 1892,[4] every person who publishes, prints, or offers for sale or distribution, or sells, distributes, or exhibits to view, or causes to be published, printed, exhibited to view or distributed, any indecent or obscene book, paper, print, photograph, drawing, painting, representation, model, or figure, or publicly exhibits any disgusting or indecent object, or writes or draws any indecent or obscene word, figure, or representation in or on any place where it can be seen by the public, or sings or recites in public any obscene song or ballad, is liable to a penalty of £10, or alternatively without penalty to imprisonment for sixty days.

By the Indecent Advertisements Act, 1889, the affixing, etc., of indecent or obscene pictures, etc., is punishable.[5]

SUBSECTION (8).—*The Prevention of Corruption Act,* 1906.[6]

344. This statute makes provision for the punishment of those guilty of corrupt transactions with agents. By section 1, if any agent corruptly accepts or obtains, or agrees to accept, or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after 4th August 1906 done or forborne to do, any act in relation to his principal's affairs or business, or for shewing or forbearing to shew favour or disfavour to any person in relation to his principal's affairs or business ; and similarly, if any person corruptly gives or agrees to give or offers any gift or consideration to any agent for such purpose, he is

[1] Criminal Procedure Act, 1887, s. 61.
[2] Macdonald, p. 208 ; Anderson, p. 98 ; *Robinson,* 1843, 1 Broun 590, 643.
[3] 8 Edw. VII. c. 48, ss. 16, 63.
[4] 55 & 56 Vict. c. 55, s. 380 (3).
[5] 52 & 53 Vict. c. 18 ; *Dingwall* v. *Stevenson,* 1892, 20 R. (J.) 16 ; 3 White 362.
[6] 6 Edw. VII. c. 34.

guilty of a misdemeanour. The offender is liable (1) on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine not exceeding £500, or to both such imprisonment and such fine ; or (2) on summary conviction (before the Sheriff, s. 3), to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding £50, or both to such imprisonment and such fine. Any person who knowingly gives to any agent, or any agent who knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal, is liable on conviction to the same penalties (s. 1). For the purposes of the Act "consideration" includes valuable consideration of any kind (s. 1 (2)). "Principal" includes an employer; and "agent" includes any person employed by or acting for another (*ibid.*), and includes a person serving under the Crown, or under any corporation, or any municipal, burgh, county, or district council, or "any board of guardians" (this last expression is not interpreted for Scotland) (s. 1 (3)). The scope of the statute is not confined merely to mercantile affairs; it applies to employment for state and municipal duties. Accordingly, in a complaint under the Act charging an attempt to bribe a police constable while in the execution of his duty and acting for his employer the Chief Constable, it was held that the police constable was an agent in the sense of the Act.[1]

Subsection (9).—*Violating Sepulchres.*[2]

345. It is a crime to disinter a body from its last resting-place. It is not necessary, for the commission of the crime, that the body should be removed from a grave or mortuary. Any interference with the corpse after it has been buried or finally placed in a mortuary constitutes the *crimen violati sepulchri*. The offence is not regarded as a theft, but as an indecency, and a crime *suæ naturæ*.[3] The essence of the crime is the disturbing of a body which is still in a condition to be regarded as an object of reverential treatment.[4] The crime is punished by imprisonment or penal servitude.

Subsection (10).—*Fortune-telling.*

346. Fortune-telling was formerly included under the crime of witchcraft, and was made punishable by death under the statute of 1563, c. 73. This Act was repealed, however, by 9 Geo. II. c. 5, which ordained that no prosecution should thereafter be made on the charge of witchcraft; and, by the same Act, all persons pretending to occult skill, or under-

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[1] *Graham* v. *Hart*, 1908 S.C. (J.) 26.
[2] Alison, i. 461 ; Macdonald, pp. 24, 70 ; see also Hume, i. 85.
[3] *H.M. Adv.* v. *Soutar*, 1882, 5 Coup. 65. [4] *H.M. Adv.* v. *Coutts*, 1899, 3 Adam 50.

taking to tell fortunes, might be sentenced to imprisonment for one year, and to stand in the pillory, and to find security for their future good behaviour. Thereafter cases of fortune-telling were dealt with on this statute and upon the common law against cheating and swindling.[1] By the Act 5 Geo. IV. c. 83, s. 4, fortune-tellers were included, along with other vagrant characters, under the general category of rogues and vagabonds, and might be sent to prison for three months. This Act was made applicable to Scotland by 34 & 35 Vict. c. 112, s. 15.[2] No prosecution took place under it until the case of *Smith* v. *Neilson*.[3] The Court quashed the conviction, holding that the complaint was irrelevant, in respect that it did not set forth that the accused had pretended to tell fortunes with intent to deceive and impose on anyone.

Subsection (11).—*Card-sharping.*

347. Cheating or sharping by means of cards is punishable at common law as a species of fraud.[4] In the case of *Clark* certain confederates were found guilty at common law of falsehood, fraud, and wilful imposition, inasmuch as they had got money from a stranger in a railway carriage by one of them pretending to have lost money to another at cards, and begging a loan to help him to recover his losses. Card-sharping is also criminal by statute. By the Prevention of Gaming (Scotland) Act, 1869,[5] it is provided (s. 3) that "all chain-droppers, thimblers, loaded-dice players, card-sharpers, and other persons of similar description, who shall be found in any public place, or in any grounds open to the public, or in any public conveyance, in possession of implements or articles for the practice of chain-dropping, thimbling, loaded-dice playing, card-sharping, or other unlawful gaming, or who shall in any such place, grounds, or conveyances, exhibit such implements or articles in order to induce or entice any person to engage in any such game, or who, by any such fraudulent act or device, shall cozen and cheat or attempt to cozen and cheat any person in any public place or in any grounds open to the public, or in any public conveyance, may be convicted before a magistrate [including the Sheriff and Sheriff-Substitute of the county (s. 2)] on the testimony of one or more credible witness or witnesses, and on conviction shall be imprisoned, with or without hard labour, for any term not exceeding sixty days, and shall also at the same time be sentenced to repay any money or restore any property which they may have obtained by means of any such offence, and failing such payment or restoration may, under the same procedure, be committed to or detained in prison, with or without hard labour, for any further term not exceeding sixty days."

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[1] Burnett, p. 173; Hume, i. 174.
[2] *M'Lean* v. *Murdoch*, 1882, 10 R. (J.) 34; 5 Coup. 193.
[3] 1896, 23 R. (J.) 77; 2 Adam 145; see also *Laing* v. *Macpherson*, 1918, J.C. 70.
[4] Macdonald, p. 84; Anderson, pp. 105, 194; *Clark*, 1859, 3 Irv. 409.
[5] 32 & 33 Vict. c. 87.

Section 8.—Crimes against Property.

Subsection (1).—*Theft.*[1]

348. Theft is the felonious taking and appropriation of property without the consent of the owner or custodier. Variations of the crime will be considered in the paragraphs dealing with habit and repute,[2] housebreaking,[3] breaking into lockfast places,[4] reset,[5] and *plagium*.[6] Theft falls to be distinguished from robbery [7] in respect that the latter connotes the taking of property by violence. Theft must also be distinguished from breach of trust and embezzlement.[8] In the latter crime the felonious appropriation is effected by a person who has received a limited ownership of property, subject to restoration at a future time ; or possession of property, subject to liability to account for it to the owner. In theft, on the other hand, the subject feloniously appropriated is neither in the limited ownership of the accused nor yet in his possession subject to a liability to account.

349. It is, of course, clearly theft where the subject feloniously appropriated is taken by someone who has no right or title to it, but difficult cases arise where the accused had custody of the subject. Thus an agent who has custody of goods but whose agency has been cancelled, may be guilty of theft if he keep the goods; they are merely temporarily in his custody.[9] If the accused, having received the custody of property for a limited and specific purpose, after the performance of which it is to be restored to the owner *in forma specifica*, feloniously appropriates it, the crime is theft. Typical examples of such theft are shop assistants stealing goods or customers' money, messengers sent with money or goods appropriating the money or goods for their own purposes, workmen engaged in repairing articles appropriating them, paupers pawning the poorhouse clothes, servants selling their livery.

350. Prior to 1887 it was of great moment to determine whether the crime libelled was theft or breach of trust, as a conviction could not be obtained unless the prosecutor proved the precise crime libelled. Since 1887, however, the distinction between the crimes is less vital, since by s. 59 of the Criminal Procedure Act of that year it is provided that under an indictment for breach of trust and embezzlement, the person accused may be convicted of theft or of reset and *vice versa*. The same statute provides (s. 63) that it is competent to libel as an aggravation of either type of crime a previous conviction of any crime inferring dishonesty. The Summary Procedure Act, 1908, s. 5, Sched. B, makes these provisions applicable to summary trials. The distinction between theft and breach of trust and embezzlement, however, is still of some importance,

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[1] Hume, i. 56 ; Alison, i. 236 ; Macdonald, p. 18 ; Anderson, p. 174.
[2] Para. 371, *infra*.
[3] Para. 363, *infra*.
[4] Para. 370, *infra*.
[5] Para. 380, *infra*.
[6] Para. 375, *infra*.
[7] Para. 376, *infra*.
[8] Para. 381, *infra*.
[9] *H.M. Adv.* v. *Mitchell*, 1874, 3 Coup. 77.

as the former is more severely punished. Theft is sometimes hard to distinguish from falsehood, fraud, and wilful imposition.[1]

351. There can be no theft of anything unless it be a subject either of public or of private property. Accordingly, there cannot be theft of any portion of the water of the sea, or of the atmosphere, or of any wild animal, or of any human being above the age of puberty. As regards wild animals, there may be theft of them, if by slaughter, or capture, or enclosure they have been made subjects of private property.[2] Thus a libel for theft of fish was sustained where an accused had cut away from a fisherman's boat a net in which a quantity of herring were enclosed.[3] By statute the taking of oysters or mussels from beds which are private property, and sufficiently marked out to be capable of identification, is theft.[4]

352. Whilst the thing taken must be property, it does not matter whether it is public or private property, whether it belongs to an individual or to a community, or whether the owner be known or not.[5] Felonious abstraction of lost property is theft.[6] So too is it theft if a person appropriates something which has been accidentally dropped; at any-rate if he knows that it has been so dropped.[7] But where an accused was charged that having "found in money one pound, he did deny having found the same and did appropriate and thus steal the same," the complaint was dismissed as irrelevant.[8] The statement by Hume [9] that it is not theft if a landowner appropriates an animal which has been found straying on his lands, or if the finder of a pocket-book with the owner's name upon it on the highway appropriates it to his own use, is certainly not now law. It does not matter in whose possession the article appropriated may be at the time at which it is abstracted. Even if the goods be in the hands of someone whose possession is wrongful, it is theft to take them for the purpose of appropriating them feloniously.[10] It seems to be doubtful whether it is theft if a man dishonestly recovers possession of his own property, with the possession of which he has parted under a contract such as pledge. In such a case a charge of fraud is probably more appropriate.

353. To constitute the crime of theft there must be felonious intention [11] in the appropriation. It is not theft if a person takes what he

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[1] *H.M. Adv.* v. *Hill*, 1879, 4 Coup. 295; *H.M. Adv.* v. *Wilson*, 1882, 5 Coup. 448; 19 S.L.R. 772.

[2] Hume, i. 81 *et seq.*; Alison, i. 279 *et seq.*; *Wilson* v. *Dykes*, 1872, 2 Coup. 183; 10 M. 444. See also on taking trout from streams and lochs, *Pollock* v. *M'Cabe*, 1910 S.C. (J.) 23; 6 Adam 139.

[3] *Huie*, 1842, 1 Broun 383; Bell's Notes, 26.

[4] 3 & 4 Vict. c. 74; 10 & 11 Vict. c. 92; *Thomson*, 1842, 1 Broun 475; *Garret*, 1866, 5 Irv. 259; *Chisholm* v. *Black*, 1871, 2 Coup. 49.

[5] Hume, i. 77; Alison, i. 277. [6] *Blair* v. *M'Clullich*, 1880, 4 Coup. 355.

[7] *H.M. Adv.* v. *Cunningham*, 1869, 1 Coup. 385.

[8] *Campbell* v. *M'Lennan*, 1888, 15 R. (J.) 55; 1 White 604. [9] i. 62.

[10] Hume, i. 78; Alison, 1. 273; *Wood*, 1842, Bell's Notes, 23; *Tonner*, 1846, Ark. 215; *Smith*, 1838, 2 Swin. 28.

[11] Macdonald, p. 20.

honestly believes to be his own,[1] or is justified in thinking that he has the owner's permission to take.[2] So, too, if goods be carried off under a poinding, however irregular, there is no theft as there is no felonious intent.[3] But in such cases it is essential that there be honesty of belief and purpose. If the owner's permission is obtained by fraud,[4] or if the use of a legal process be merely a cloak to conceal the felonious intent, theft is committed. Moreover, the crime is still theft though the owner knows that a theft is being committed, as for example, where he sets a trap for the thief.[5] In considering whether or not felonious intent is present, the most difficult cases arise where the accused is the husband or wife of the owner.[6]

354. The institutional writers have held the view that it is not theft to take unauthorised use of another man's horse, or bicycle, or farm implement, provided that there is throughout an intention of returning it.[7] There is an onus, no doubt, upon the wrongdoer, which may be greater or less according to the circumstances of the case, to shew that there was no intention dishonestly to appropriate. If the article be one ordinarily let for hire, it may be fraud to take a surreptitious use of it, although it does not amount to theft. Hume treats of the case of a landowner driving his neighbour's cattle on to his own land for the purpose of impounding them, and then fraudulently claiming payment for releasing them. In the learned author's opinion this is not theft.[8] Macdonald puts the case of one who takes a book to learn the secrets of some process used by the owner and the act is detected before he returns it, or even after he has returned it. In his opinion there is theft in such a case.[9] There have been, however, two recent cases[10] dealing with the general question of *furtum usus*, the result of which appears to be that *furtum usus* is not truly theft, but that it may none the less be a crime, at any rate when there is something clandestine in the conduct of the accused in abstracting the article of which he made use.

355. The taking must be with intent to appropriate and to deprive the owner of his property. Although the abstraction must be felonious, it is not necessary that there should be any element of cupidity. It is theft although the article is removed from motives of malice or revenge,

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[1] *Sandars*, 1833, Bell's Notes, 20.
[2] Hume, i. 74; Alison, i. 271; Burnett, p. 118.
[3] Hume, *supra*; Alison, *supra*.
[4] Hume, i. 68; Alison, i. 259; *Menzies*, 1842, 1 Broun 419; Bell's Notes, 17; *Batt*, 1832, 5 Deas & And. 260; *Grahame*, 1847, referred to in J. Shaw 241, at p. 243 n.; *H.M. Adv.* v. *Hill*, 1879, 4 Coup. 295; *Hardinge*, 1863, 4 Irv. 347; 35 Sc. Jur. 303; *H.M. Adv.* v. *Wilson*, 1882, 5 Coup. 48; 19 S.L.R. 772. See Macdonald, p. 21.
[5] Macdonald, p. 22.
[6] *Becket*, 1832, Shaw (Just.) 217; Bell's Notes, 23; *M'Leod*, 1838, 2 Swin. 190; *Kilgour*, 1851, J. Shaw 501; 24 Sc. Jur. 66; *Muirhead* v. *M'Intosh*, 1886, 13 R. (J.) 52; 1 White 105.
[7] Hume, i. 73; Alison, i. 270; Macdonald, p. 22; *Macintosh*, 1841, Bell's Notes, 20.
[8] i. 73.
[9] Macdonald, p. 22; *H.M. Adv.* v. *Mackenzie*, 1913 S.C. (J.) 107; 7 Adam 189.
[10] *Strathern* v. *Seaforth*, 1926, J.C. 100; *Murray* v. *Robertson*, 1927, J.C. 1.

and is forthwith destroyed, or hidden, or cast adrift.[1] It is necessary, however, that the article should be removed by the offender. It is not theft to destroy it where it is found,[2] nor is it theft to unloose an animal and let it wander away, or a boat and let it drift away. But even if the thing taken have no value, if there be felonious appropriation with intent to deprive the owner of it, that is theft.[3]

356. The modes of commission of theft are twofold: [4] (*first*) where the offender takes property from the custody of another; (*second*) where he himself has the custody. In the first case there must be actual removal from the place where the property is (*amotio*). So it is not theft if the hand of a pickpocket be discovered in a person's pocket and held there,[5] or if the owner seizes, before it leaves his pocket, his watch which a thief is attempting to obtain.[6] But it is theft if the watch is extracted from the pocket though it still remains attached to the owner's person by means of the chain.[7] There must be actual removal ; it is not enough that the clothes on a bed have been rolled down to the bottom of it if they have not been actually removed ; [8] but if something be taken from the bed and placed on the floor beside it, that is enough to constitute actual removal.[9] It is enough if a thief inserts a stick through a window and draws an article towards him.[10] Once there has been actual removal, however slight, the crime is complete.[11]

357. The second mode whereby theft may be committed is where the thief feloniously appropriates that which is already in his custody. The distinction between this mode of theft and breach of trust has already been adverted to.[12] It is clearly theft where the appropriator of property had received but the bare custody for some special purpose. So if a storekeeper appropriates goods placed in his store for safe custody,[13] or a borrower takes that which he has borrowed,[14] or a servant that which he is told to deliver,[15] or a shopman who is merely the hand of his employer

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[1] Hume, i. 75 ; Alison, i. 273 *et seq.*; Macdonald, p. 23 ; Burnett, p. 116. [2] Hume, i. 75.

[3] Hume, i. 76 *et seq.*, 101 *et seq.* ; Alison, i. 278 *et seq.* ; Macdonald, p. 24. Whether pasturing sheep on the growing grass of another is theft is not decided (*Robertson*, 1867, 5 Irv. 480 ; 4 S.L.R. 251) ; Macdonald thinks it would be. It is not theft to take a dead body from a grave, but it is theft to remove it before burial ; Macdonald, p. 24.

[4] Macdonald, p. 25. [5] *Lyndsay*, 1829, Bell's Notes, 19.

[6] *Cameron*, 1851, J. Shaw 526 ; 24 Sc. Jur. 140.

[7] *Cameron, supra ; Purves*, 1846, Ark. 178 ; *H.M. Adv.* v. *Reilly*, 1876, 3 Coup. 340.

[8] Hume, i. 70 ; Alison, i. 269 ; Macdonald, p. 27 ; Anderson, p. 176.

[9] *Paterson*, 1827, Syme 174. [10] *O'Neil*, 1845, 2 Broun 394.

[11] Bell's Notes, 19, and cases there ; *M'Caughie*, 1836, 1 Swin. 205 ; *Walker*, 1836, 1 Swin. 294 ; *Ash*, 1848, Ark. 493.

[12] Para. 348, *supra* ; Macdonald, p. 38 *et seq.*

[13] *H.M. Adv.* v. *Anderson*, 1887, 1 White 475 ; 25 S.L.R. 9.

[14] Hume, i. 69 ; *Barr*, 1832, 5 Deas & And. 260 ; *Smith*, 1830, 2 Sc. Jur. 144 ; *Hardista*, 1842, Bell's Notes, 16 ; *M'Graw*, 1863, 4 Irv. 381 ; 35 Sc. Jur. 459 ; *H.M. Adv.* v. *Rodger*, 1868, 1 Coup. 76 ; 5 S.L.R. 590 ; *Smith*, 1838, 2 Swin. 28.

[15] *Drummond*, 1832, Bell's Notes, 14 ; *Macdonald*, 1832, Bell's Notes, 15 ; *Nicolson*, 1842, 1 Broun 370 ; *Murray*, 1829, Shaw (Just.) 225 ; 2 Sc. Jur. 64 ; *Mackintosh*, 1835, 13 S. 1168 ; 7 Sc. Jur. 195 ; *Field*, 1838, 2 Swin. 24 ; Bell's Notes, 16 ; *Paterson*, 1840, 2 Swin. 521 ; *Michie*, 1839, 2 Swin. 319 ; *Stewart*, 1830, 5 Deas & And. 149 ; *Watt*, 1851, J. Shaw 519 ; 24 Sc. Jur. 65 ; see Macdonald's comments thereon at p. 42.

and has no independent control takes money or goods,[1] or a tradesman appropriates some article sent for repair,[2] all are guilty of theft. The distinction between theft and breach of trust is sometimes very fine, but it appears to be founded on whether the accused person is at the time of appropriation merely the hand of the owner, acting within precise limits and bound to restore the subject *in forma specifica*, or whether he is rather an independent actor, or agent under liability to account.[3]

358. The accessory in theft is equally guilty with the principal, and accession may be inferred even though the alleged accessory may not know all that is done. Thus, for example, if two people agree to pick a person's pocket, both are guilty although only one actually abstracts the article, and the other does not know what he has got. The same would probably be held if two persons, acting in concert, mingled with a crowd for the purpose of pocket-picking, though here the proof might be difficult. It has even been suggested that when a gang of thieves is at work in concert in a town, all are guilty of every theft committed by any one of the gang. Certainly, whoever assists or abets in any way, as by watching, or secreting, or rushing off with the stolen property immediately it is seized, is guilty of theft. Where a child steals, a person sending it out for the purpose is guilty of theft. It appears to be necessary, however, in every case that there should be guilty knowledge prior to the commission of the deed, accession after the fact not being sufficient to constitute the crime of theft.[4]

359. Theft may be aggravated in various ways. Some of these, viz. *plagium* [5] or child-stealing, habit and repute,[6] theft by housebreaking,[7] and theft by opening lockfast places,[8] are separately dealt with. Where the thief is a person such as a policeman,[9] whose duty it is to protect property, the crime is aggravated. Theft of animals,[10] theft of young children's clothes, theft from churches, theft from bleachfields,[11] are all regarded as aggravated forms of the crime.

360. The possession of stolen articles within a short period after the theft, without the accused being able satisfactorily to account for the circumstances, is evidence of theft, and warrants the jury in convicting

[1] Hume, i. 65; *Pearse*, 1832, Bell's Notes, 10. This principle has been extended to tellers in banks (*Smith*, 1842, 1 Broun 342; Bell's Notes, 11; *Gordon*, 1846, Ark. 196).

[2] *Brown*, 1839, 2 Swin. 394; Bell's Notes, 9; *Anderson*, 1858, 3 Irv. 65; *Watt*, 1851, J. Shaw 519.

[3] Other instances where the crime is theft are *Craig*, 2 Sc. Jur. 31 (lodging-house keeper); *H.M. Adv.* v. *Wilson*, 1882, 5 Coup. 48, 19 S.L.R. 772 (retail dealer pawning goods received on approbation); *Mooney*, 1851, J. Shaw 496 (shopkeeper keeping bank-note and not giving change); *Anderson*, 1858, 3 Irv. 65; *H.M. Adv.* v. *Martin*, 1873, 2 Coup. 501 (pauper keeping poorshouse clothes); *Mackay*, 1826, Syme 53; *Dalziel*, 1842, 1 Broun 217 and 425; *Kneen*, 1858, 3 Irv. 161 (carriers, etc., appropriating goods); *H.M. Adv.* v. *Wormald*, 1876, 3 R (J.) 24; 3 Coup. 246 (law agent); *H.M. Adv.* v. *City of Glasgow Bank Directors*, 1879, 6 R (J.) 19; 4 Coup. 161 (bankers); *H.M. Adv.* v. *Smyth*, 1887, 1 White 413; 24 S.L.R. 613 (manager of company).

[4] Macdonald, p. 45 *et seq.*

[5] Para. 375, *infra*.

[6] Para. 371, *infra*.

[7] Para. 363, *infra*.

[8] Para. 370, *infra*.

[9] *Ferrie*, 1831, Bell's Notes, 34.

[10] This was formerly regarded as a serious crime; Hume, i. 87; Alison, i. 309.

[11] 18 Geo. II. c. 27, and 51 Geo. III. c. 41.

of theft without any further evidence.[1] It does not, however, raise such a legal presumption of guilt as to require the jury to convict of theft rather than of reset.[2]

361. As in the case of other offences, so in the case of theft an accused person may be convicted of the attempt under an indictment or complaint which charges the full offence.[3] Where attempt is charged, the accused may be convicted although the full crime is proved by the evidence.[3] It is no answer to a charge of attempt that there was nothing to steal, as, for example, where the accused has rifled the pockets of some person who had nothing in his pockets.

362. Theft was never a capital offence in Scotland in the sense that a single act of theft necessarily implied a capital sentence. Trivial thefts were not so punished. But a death sentence might be inflicted even for a single act when the theft was of a serious character (*furtum grave*), and in particular when horses, cattle, or sheep had been stolen. Aggravations, such as housebreaking or previous convictions, might render the offence capital. Apart from these special cases, there does not appear to have been any very sharp dividing line between thefts which were capital and others which inferred only an arbitrary punishment, and the result of a careful examination of precedents by Hume is rather inconclusive.[4] No form of theft is now capital,[5] and the punishment may be fine, imprisonment, or penal servitude. In the case of theft of oysters or mussels from the seashore, the punishment is limited to twelve months for the completed act and three months for the attempt.[6]

Subsection (2).—*Housebreaking.*[7]

363. Housebreaking is not in itself a point of dittay. In practice it is nearly always associated with the crime of theft, either as an aggravation of that crime or with intent to commit it. Stouthrief and robbery [8] may be aggravated by being committed by means of housebreaking. Breaking into a house with intent to assault, and assaulting the occupier, is an aggravated form of assault, known as hamesucken,[9] and, even where the circumstances do not amount to hamesucken, would be considered a serious aggravation.[10] Housebreaking has been held an aggravation of malicious mischief.[11] By statute [12] it is made an offence to break into buildings with intent to destroy woollen and other goods in the loom, or apparatus for manufactures. Shipbreaking is an aggravation of theft, to which the principles applicable to housebreaking apply

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[1] *H.M. Adv.* v. *Browne*, 1903, 6 F. (J.) 24.
[2] Dickson on Evidence, p. 157; Hume, i. 111.
[3] Criminal Procedure Act, 1887, s. 61. [4] Hume, i. 86–92.
[5] Criminal Procedure Act, 1887, s. 56.
[6] 3 & 4 Vict. c. 74, and 10 & 11 Vict. c. 92.
[7] Hume, i. 98; Alison, i. 282; Macdonald, pp. 28, 67; Anderson, p. 180.
[8] Para. 376, *infra*. [9] Para. 289, *supra*. [10] See para. 359, *supra*.
[11] *Munro*, 1831, Bell's Notes, 48; Macdonald, p. 117, note 8.
[12] 28 Geo. III. c. 46.

generally.[1] It has not been decided whether "shipbreaking with intent to steal" is a relevant charge, but there seems no reason why it should not be so held.[2]

364. Hume [3] defines housebreaking as "the forcible entry of a house." The term house includes "any roofed building" [4] (even although unfinished [5]) "so fastened as to indicate that the owner relies on its strength to protect property." [6] Where a house is divided into several apartments, each let to a separate tenant, each apartment so occupied will form a "house"; [7] but it seems questionable if this applies to a room occupied by a mere lodger in an inn being broken into by another lodger under the same roof.[8]

365. Forcible entry implies the existence of a security to be overcome. "The law always understands it to be housebreaking when the thief opens a way into the house for himself, and overcomes the ordinary obstacles provided against entry, and for the safe keeping of the effects within; though this be done without the piercing or effraction of any part of the building, or of what is attached thereto: since it is nevertheless true, that the defence and safeguard of the house are broken." [9] It is the "security," not the "sanctity," of the house which must be violated.[10] Felonious entrance is essential to the crime. If a thief be already within a house, he is not guilty of housebreaking if he break into some closed part of the house.[11] Applying the above principles, forcible entry may be effected by: (*a*) Actual breaking of some portion of the building. (*b*) Adopting some unusual mode of entry, as by the chimney or by a sewer [12]—"for neither of these is a place of entry, or necessary to be any further guarded than it is by its own nature"—or by a waterwheel,[13] or by a trap-door,[14] or by a window, provided the window, if near the ground, is not open, and the thief requires to raise the sash either wholly or partially to effect entry.[15] Although not expressly decided, entry by an open window in an upper storey would apparently be forcible entry.[16] An open window merely protected by unfastened folding blinds, or a broken pane protected by a moveable board, would not be considered secured.[17] (*c*) Entry through a door which is secured in such fashion as to guard the house from a violation of its security.[18] The ordinary case is where the door is locked

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[1] Macdonald, p. 35; *Guthrie*, 1867, 5 Irv. 368. [2] Macdonald, p. 68. [3] i. 98.
[4] Breaking into a shop or a church is "house" breaking; Macdonald, p. 28.
[5] Hume, i. 103; *Wright*, 1837, Bell's Notes, 41; *Boax*, 1827, Syme 248 (indictment).
[6] Macdonald, p. 28. [7] Alison, i. 293; *Duncan*, 1849, J. Shaw 225.
[8] Hume, i. 101. [9] Hume, i. 98.
[10] *Alston*, 1837, 1 Swin. 433, per Lord Mackenzie at p. 468; Bell's Notes, 37.
[11] Hume, i. 101; Alison, i. 287; Macdonald, p. 29.
[12] *Mann*, Bell's Notes, 37; Macdonald, p. 29.
[13] *Hunter*, 1801, Hume, i. 99; Bell's Notes, 37.
[14] *H.M. Adv.* v. *Sutherland*, 1874, 3 Coup. 74.
[15] Hume, i. 100; Alison, i. 283; cases in Bell's Notes, 37, 38, 39. [16] Macdonald, p. 32.
[17] Hume, i. 98 *et seq.*; cases in Bell's Notes, *supra*. See cases of *Martin*, 1832, p. 38, and *Davidson*, 1841, p. 38, and 2 Swin. 630, as to entry by window when that is a usual mode of entry; *Mackintosh*, 1846, Ark. 133. [18] Macdonald, p. 31.

or barred. It is not enough that it is on the latch [1] or even locked if the key be left on the outside.[2] To enter a house thus insecurely guarded is not housebreaking. It is a doubtful question whether it be housebreaking if the accused open the door with a key hanging within his sight and reach.[3] It is also doubtful whether a door is properly secured by having some article placed against it on the inside.[4] On the other hand, opening the door by forcing or otherwise removing an inside bar or bolt, or by breaking or picking the lock or opening the lock with false keys, or with the true key feloniously obtained or illegally retained, is housebreaking.[5] So if a servant on leaving his master's employment keeps a key and later uses it for feloniously entering his master's premises he commits housebreaking.[6] So, too, if a man receives a key for a temporary purpose and uses it to enter, it is housebreaking, but it is probably otherwise if he be the usual custodian of the key.[7] (*d*) Entry by holes or apertures, to which the same principles as those referred to in the case of doors and windows appear applicable.[8] (*e*) Entry by artifice, as by getting the door opened on false pretences and then rushing or forcing a way in. "The owner is here simply an instrument in their hands, and serves in a manner as a key to the house, of which they have falsely and feloniously got possession." [9] (*f*) Entry by collusion with an inmate of house, or, being lawfully within the house, unfastening any secured means of entry, and afterwards returning and thus obtaining entry.[10]

366. The security being violated, entry may be made by the insertion of the hand or an instrument to remove property, as well as by complete physical entry.[11] The above principles apply equally to all acts of housebreaking, viewed either as an aggravation of theft or with intent to steal. In the latter case entry is not essential, provided the security has been destroyed. Where the security was not completely overcome, a charge of breaking the door of a house with intent to enter and steal was held relevant.[12] This might now be charged as attempted housebreaking.

367. It has not been decided whether breaking out of a house after theft or attempted theft amounts to housebreaking. The weight of opinion seems against it being so considered.[13]

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[1] *Smith*, 1834, Bell's Notes, 36; *Wilson*, 1837, Bell's Notes, 37; *Anderson*, 1862, 4 Irv. 235.

[2] *Alston*, 1837, 1 Swin. 433; Macdonald, p. 31.

[3] *Alston, supra*; *Jardine*, 1858, 3 Irv. 173, per Lord Deas.

[4] Macdonald, p. 30.

[5] Hume, i. 98 *et seq.*; *Thomson*, 1827, Syme 187; *Mackenzie*, 1832, Bell's Notes, 37; *Devine*, 1829, 5 Deas & And. 145; Bell's Notes, 36; *Ashton*, 1837, 1 Swin. 478; Bell's Notes, 36.

[6] *Jardine*, 1858, 3 Irv. 173.

[7] *Farquharson*, 1854, 1 Irv. 512, per Lord Justice-General M'Neill; *Jardine, supra*.

[8] Macdonald, pp. 33, 34; cases there cited.

[9] Hume, i. 100.

[10] Hume, i. 99, 101.

[11] Hume, i. 101 *et seq.*; Alison, i. 288 *et seq.*; cases in Bell's Notes, p. 39; *O'Neil*, 1845, 2 Broun 394.

[12] *Monteith*, 1840, 2 Swin. 483; Macdonald, p. 67.

[13] Hume, i. 101; Macdonald, p. 34.

368. Theft by housebreaking was formerly capital, and Hume quotes numerous instances of this sentence being pronounced. The punishment has for many years been limited to penal servitude or imprisonment, and a capital sentence is now no longer competent.[1] Minor cases are sometimes tried by the Sheriff summarily. In exceptional circumstances the option of a fine has even been given, and the Probation of First Offenders Act, 1887, may, in suitable cases, be taken advantage of. Where the party whose house is entered has reason to believe that there is imminent danger to the lives or persons of the inmates, he may be justified in killing the housebreaker. The danger is presumed to be imminent at night.[2]

369. Under s. 409 of the Burgh Police (Scotland) Act, 1892, every known or reputed thief, or associate of known or reputed thieves, in whose possession are found picklocks or other implements usually employed in housebreaking, is liable to be apprehended, and, on conviction, sentenced to imprisonment not exceeding sixty days. The section appears to contemplate that the mere possession of such implements by a party of the character in question is sufficient for conviction; but it would be reasonable that the magistrate should be satisfied that the circumstances point—as they will no doubt as a rule do—to the possession being felonious.

Subsection (3).—*Opening Lockfast Places.*[3]

370. It is an aggravation of theft that it has been committed by "opening lockfast places." In this category is included breaking into rooms, etc., within a house;[4] cabins in a ship;[5] and any article the contents of which are secured by lock and key. It is immaterial whether the security of the lockfast place is overcome by actual violence, or by picking the lock, or stealing the key, or using false keys.[6] If the key has been left in the lock, the better opinion would rather appear to be that the aggravation does not occur should the thief make use of the key to open the room or article. But if the key has been concealed, or removed from the lock and laid elsewhere, as on a table, etc., the full crime is committed if it be taken from that situation and the lock so opened.[7] If a locked box be stolen, the subsequent opening of the box and removal of the contents does not constitute theft by opening lockfast places.[8] Opening lockfast places with intent to steal can now be charged as an attempt to commit theft.[9]

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[1] Criminal Procedure (Scotland) Act, 1887, s. 56. [2] Macdonald, p. 143.
[3] Macdonald, p. 35 *et seq.*; Anderson, p. 179 *et seq.*
[4] *Gilchrist and Hislop*, Bell's Notes, 34; *Cathie*, 1830, Bell's Notes, 34.
[5] *Henderson and Craig*, 1836, 1 Swin. 300; Bell's Notes, 35; *Miller*, 1838, Bell's Notes, 35.
[6] Alison, i. 295; Macdonald, p. 36, and cases there cited.
[7] Alison, i. 296.
[8] *Stuart and Low*, 1842, 1 Broun 260; Bell's Notes, 34; *Walker*, 1836, 1 Swin. 294.
[9] Criminal Procedure Act, 1887, s. 61; see Macdonald, p. 69, and especially note 4 there.

Subsection (4).—*Habit and Repute.*

371. It is an aggravation of the crime of theft that the offender is "habite and repute" a thief. Even a single act of theft, if combined with this aggravation, was formerly capital. Hume,[1] in describing this rule as "reasonable" as well as "useful," states the principle thus: "In such a case when the man's general character and way of life have been duly established, the particular act comes to be considered as a confirmation only, and a detected instance of his daily course of evil-doing." [2] This affords the key to what is necessary to establish the aggravation. That the pannel is of doubtful fame or the subject of evil rumours is insufficient—"the reputation requisite to be established must amount to something like making a trade of theft." The aggravation is limited to theft, and has been held not to apply to other crimes inferring dishonesty, even although of a similar nature.[3]

372. Previous convictions of theft are not essential, although they may form important adminicles of proof of habit and repute. The essential point to be established is that the accused has "been marked as a known thief by the common *bruit* and report of the neighbourhood, and has had a character affixed to him as a brother of the trade." [4] Active participation in theft is not requisite, if accused is the associate of thieves and living by theft. In *M'Ghee* it was held that the aggravation might apply to a person who was bedridden.[5] The minimum period during which the reputation must have existed does not appear to be absolutely decided. It must certainly not be less than twelve months, although in some of the earlier decisions shorter periods appear to have been held sufficient. In one case [6] it appears to be doubted whether a bare twelve months is enough, but the case is not very clearly reported. The twelve months must be immediately prior to the commission of the crime to which the aggravation applies, and must have continued down to the date of apprehension. In the case of *Heron*,[7] where the accused absconded, and an interval of over six years occurred between the crime and the trial—no proof of character during that period being available—it was held that evidence of habit and repute at the time of the offence was insufficient. The aggravation in this case was libelled "you are habit and repute a thief"; but the opinion was expressed by Lord Moncreiff that even if "were" had been substituted for "are," the facts would not have constituted a relevant aggravation. Macdonald, however,[8] considers that the aggravation might, where otherwise applicable, be relevantly laid in the past tense. The repute for the requisite period

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[1] i. 92.

[2] Hume, i. 92; *cf.* Bell's Notes, 28–31; Alison, i. 296; Macdonald, p. 46; Anderson, p. 181; Renton and Brown, p. 133.

[3] Hume, i. 94; *Buckley*, 1822, Shaw (Just.) 73; *Cathie*, 1823, Shaw (Just.) 93; *Falconer*, 1852, J. Shaw 546; see also Bell's Notes, 31, 32.

[4] Hume, i. 93.

[5] 1861, Macdonald, p. 47.

[6] *Dempster*, 1862, 4 Irv. 143.

[7] 1838, 2 Swin. 104.

[8] p. 47.

must apparently exist in Scotland.[1] In estimating the twelve months, periods of imprisonment either prior or subsequent to trial cannot be reckoned, but periods of repute prior and subsequent to imprisonment may be combined so as to make up the full period.[2] It is not essential that the accused should have abstained from all honest employment, provided that such employment has not been sufficient to remove his general evil reputation. The question is one for the jury.

373. The provisions of s. 67 of the Criminal Procedure (Scotland) Act, 1887, as to previous convictions not being referred to in the presence of the jury until after a verdict of guilty, do not apply to proof of habit and repute.[3] In *Hunter's* case Lord Shand says: "I cannot but think that the recent legislation requires that this matter of habit and repute should be put on the same footing as that of previous convictions . . . I am bound to say, however, that, so far as my opinion is concerned, I should be very much satisfied to see the whole matter of habit and repute swept away." The jury require to find whether or not the aggravation is proven—not whether there was foundation for such belief in the neighbourhood, but "was he, or was he not, so reputed in the country? Did his neighbours, or did they not, come to that conclusion about him?"[4] In recent years police evidence of repute has in practice generally been held sufficient.

374. The habit and repute is merely an aggravation of the particular crime of theft charged. If the pannel is acquitted of that crime, even although the jury hold the aggravation established, no punishment can follow.[5] An acquittal, however, in the above circumstances will not prevent the aggravation being libelled and proved in a subsequent trial on a new charge of theft. The aggravation of habit and repute is now seldom libelled.

Subsection (5).—*Plagium*.[6]

375. *Plagium* is the theft of a child under puberty.[7] It is immaterial whether the child is legitimate or illegitimate, whether it is an orphan in the custody of guardians or one of a family living with parents. The crime of *plagium* is committed whether the child accompanies its abductor of its own free will or is enticed or forced away from its legal guardians.[8] It is a crime to "detain and secrete" a child known to have been stolen. Such a charge is equivalent to a charge of reset.[9] *Plagium* is an aggravated theft in its own nature. A previous conviction of an ordinary theft is an aggravation of *plagium*.[10]

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[1] *Todd*, 1835, Bell's Notes, 31.
[2] Macdonald, p. 48.
[3] *H.M. Adv.* v. *Hunter*, 1890; 17 R. (J.) 57; 2 White 501; see also *H.M. Adv.* v. *Browne*, 1903, 6 F. (J.) 24.
[4] Hume, i. 93, 94.
[5] In an early case quoted by Hume (*Macgrigor*, 1736), the accused, on such a finding by the jury, was ordained to find caution for good behaviour.
[6] Hume, i. 84; Alison, i. 280; Macdonald, pp. 24, 46, 50; Anderson, p. 175.
[7] *Oates*, 1861, 4 Irv. 74; 33 Sc. Jur. 705.
[8] *Wade*, 1844, 2 Broun 288; *Oates, supra*; *H.M. Adv.* v. *Cook*, 1897, 2 Adam 471.
[9] *H.M. Adv.* v. *Cook, supra*.
[10] *Rosmond*, 1855, 2 Irv. 234.

Subsection (6).—*Robbery.*[1]

376. The crime of robbery consists in the taking of property by violence—forcible theft "committed by invasion of the person." [2] The terms Robbery and Stouthrief are nowhere clearly distinguished.[3] Hume says that the crime which is now termed robbery "formerly passed under the name of stouthrief, which was applicable, generally, to every sort of masterful theft or depredation." In the case of *Larg and Mitchell*,[4] the prisoners were convicted of "Stouthrief as also Robbery," where they had obtained entry to a house in the night, by means of violent threats to pull down the house, and to kill those within, and fire their pistols through the windows; and when admitted they had presented a pistol at the master of the house, and compelled him and his wife to surrender their money. In Bell's Notes [5] four cases of charges of stouthrief are given, in all of which the crime consisted in entering into houses in a violent and masterful manner, and carrying off property. The term stouthrief is now seldom used, and the taking of property forcibly or by menaces is now termed robbery.[6]

377. It is not essential to the crime that the property taken should be upon the person at the time. It is sufficient if it is "under the immediate care and protection of the person invaded—so that, unless by force or terror applied to him, it cannot be taken away." [7] Thus it is robbery forcibly to take a horse from a person, or goods from a waggon, or sheep from a flock, or goods from a ship.

378. To constitute robbery there must be violence; but actual application of violence to the person is not necessary. What is requisite is only the taking against the will of the owner, as distinguished from that which is done stealthily, or by surprise (as by suddenly snatching a watch), and without any application to his will or fears. By violence in such a case is understood such behaviour as justly alarms for the personal and immediate consequences of resistance or refusal. "The mere display of force, and preparation of mischief, whether these appear in the weapons shewn, in the number and combination of the assailants, or in their words, gestures, and carriage, if, in the whole circumstances of the situation, they may reasonably intimidate and overcome, are therefore a proper description of violence to found a charge of robbery." [8] Any holding of the owner of property, in order to admit of its being taken from him,[9] or anything approaching to a struggle between the accused

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[1] Hume, i. 104; Alison, i. 227; Macdonald, p. 51; Anderson, p. 183.

[2] Hume, i. 104. An analogous crime was hership, the driving away of cattle by armed bands. See Hume, i. 110.

[3] See *Smith*, 1848, Ark. 473, where Lord Mackenzie said that there was not perhaps any difference between the two crimes.

[4] 1817, Hume, i. 109.

[5] Bell's Notes, 44 and 45.

[6] Macdonald, p. 52; see also *Handley*, 1842, 1 Broun 508; *M'Gavin*, 1844, 2 Broun 145; *H.M. Adv.* v. *Murray*, 1879, 4 Coup. 315.

[7] Hume, i. 106.

[8] Hume, i. 107.

[9] *Melville*, 1832, Bell's Notes, 43; *Givan*, 1846, Ark. 9.

and the victim for this purpose, amounts to robbery. Whether accepting money offered as an inducement to desist from attempt to ravish amounts to robbery has been raised but not settled.[1] The property must be actually taken; and must be taken feloniously with the purpose to appropriate it. The rules applicable to theft apply.

379. A charge of robbery may now be tried before the Sheriff.[2] Previous conviction of any crime inferring dishonesty may be libelled as an aggravation in a charge of robbery.[3] The punishment is penal servitude or imprisonment, a capital sentence being no longer competent.[2] It must be noted that while under s. 50 of the Criminal Procedure Act, 1887, theft and breach of trust are interchargeable crimes, no one can be convicted of robbery unless he is actually charged with that crime.

SUBSECTION (7).—*Reset.*[4]

380. The crime of reset consists in knowingly receiving and feloniously retaining[5] articles taken by theft, stouthrief, robbery,[6] breach of trust and embezzlement, or falsehood, fraud and wilful imposition.[7] There must be guilty knowledge. The crime is complete if the accused is privy to the retention of stolen property, knowing it to have been stolen. It is not necessary to prove that the accused ever had the property in his personal possession.[8] It is not enough that the accused had suspicions;[9] but on the other hand, he need not be directly informed that the goods were obtained dishonestly.[10] If the accused merely harbour a thief, etc., that is not enough to constitute the crime. The property itself must pass into his custody; but it is of no consequence whether he receive it directly from the offender, or through other hands.[11] If a person receive property without at the time knowing that it was dishonestly come by, and afterwards comes to know that it was taken dishonestly, he commits reset if he continue to keep it.[12] A wife is not held guilty of reset if she receive or conceal property in order to screen her husband.[13] Various points as to specification and locus have arisen in the undernoted cases.[14] Under an indictment for robbery or for theft, or for breach of trust and embezzlement, or for falsehood, fraud, and wilful imposition, a person accused may be convicted of reset.[15] There may be reset of *plagium*, and a charge that accused "did detain and secrete a child, knowing it to be

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[1] *H.M. Adv.* v. *Templeton*, 1871, 2 Coup. 140.
[2] Criminal Procedure Act, 1887, s. 56. [3] *Ibid.*, s. 63.
[4] Hume, i. 113; Alison, i. 328; Macdonald, p. 90; Anderson, p. 185.
[5] *Clark*, 1867, 5 Irv. 437; *O'Brien* v. *Strathern*, 1922, J.C. 55.
[6] Hume, i. 113; Alison, i. 328. [7] Criminal Procedure Act, 1887, s. 58.
[8] *H.M. Adv.* v. *Browne*, 1903, 6 F. (J.) 24; and see *Mackenzie*, 1846, Ark. 135.
[9] Hume, i. 114; Alison, i. 329; *Mould*, 1835, Bell's Notes, 46.
[10] *Mizzlebrook*, 1826, Syme 18. [11] Hume, i. 113.
[12] *Russell*, 1832, Bell's Notes, 46. [13] Alison, i. 338; *Hamilton*, 1849, J. Shaw 149.
[14] *H.M. Adv.* v. *M'Donald*, 1888, 15 R. (J.) 47; 1 White 593; *Maguire* v. *H.M. Adv.*, 1908 S.C. (J.) 49; 5 Adam 539; *Gold* v. *Neilson*, 1908 S.C. (J.) 5; 5 Adam 423; *Gracie* v. *Stuart*, 1884, 11 R. (J.) 22; 5 Coup. 379.
[15] Criminal Procedure Act, 1887, c. 59; *Kennedy* v. *H.M. Adv.*, 1896, 23 R. (J.) 28; 2 Adam 51.

stolen," was upheld.[1] Under s. 19 of the Prevention of Crimes Act, 1871, previous convictions of crimes inferring fraud or dishonesty may be proved where the accused had stolen goods in his possession.[2] The punishment is penal servitude or imprisonment.

SUBSECTION (8).—*Breach of Trust and Embezzlement.*[3]

381. Prior to 1887, it was of the utmost moment to determine whether a certain crime was a theft or was a breach of trust.[4] Under the form of indictment which was in vogue prior to that year, if the crime libelled was theft, and the facts proved in evidence shewed that the accused had been guilty of breach of trust and embezzlement, no conviction could follow. The same result followed in the converse case of an indictment for breach of trust and embezzlement and evidence that the crime committed was theft. Since 1887, however, the distinction between these crimes has become of less importance, because, by s. 59 of the Criminal Procedure Act of that year, it is provided that, under an indictment for breach of trust and embezzlement, a person accused may be convicted of reset or of theft, and, under an indictment for theft, a person accused may be convicted of breach of trust and embezzlement. The same statute further provides (s. 63) that it is competent to libel, as an aggravation of breach of trust and embezzlement, a previous conviction of any crime inferring dishonesty.[5]

382. As, however, theft is a crime of a graver nature than breach of trust and embezzlement, and is more severely punished, it is still of importance to differentiate facts indicating the former from those which indicate the latter offence. The two crimes may be thus distinguished. Where there is felonious appropriation by a person who has received merely the custody of property for a limited specific purpose, the property, as a rule, to be returned *in forma specifica*, that is theft. The usual instances are brokers, other than pawnbrokers, shopmen, messengers, workmen engaged to repair articles, paupers pawning the poorhouse clothes, servants selling their livery. Where there is felonious appropriation by a person who has received a limited ownership of property, subject to restoration at a future time, or possession of property, subject to liability to account for it to the owner,[6] that is breach of trust and embezzlement.[6]

383. It is breach of trust and embezzlement if there is a duty to account for an amount, as distinguished from a duty to hand over certain specific notes, or certain gold, silver, or copper coins. Thus, if a

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[1] *H.M. Adv.* v. *Cook*, 1897, 2 Adam 471.

[2] *Watson* v. *H.M. Adv.*, 1894, 21 R. (J.) 26; 1 Adam 355.

[3] Hume, i. 61; Alison, i. 356; More, ii. 388; Macdonald, p. 58; Anderson, p. 187.

[4] See para. 350, *supra*.

[5] These provisions also apply to summary trials; see Summary Procedure Act, 1908, s. 5, Sched. B.

[6] For examples of cases where the distinction has been canvassed, see *Wormald* v. *H.M. Adv.*, 1875, 3 R. (J.) 13; 3 Coup. 191; *H.M. Adv.* v. *Laing*, 1891, 2 White 572; *H.M. Adv.* v. *Mitchell*, 1874, 3 Coup. 77; *H.M. Adv.* v. *Keith*, 1875, 3 Coup. 125.

trustee or executor,[1] factor for collecting rents, treasurer of a society, or a public official, appropriate funds under his charge, the crime is breach of trust and embezzlement.[2] It is always a question for the jury to determine whether, in cases where an agent has mingled his client's money with his own, the whole circumstances shew a guilty intention to appropriate the money to his own purposes.[3] An inference of guilt was drawn where an agent, having failed to repay his client in spite of repeated applications for payment, repaid the money on being arrested.[4] If the property is given on the footing of agency, or with a power of administration, and is appropriated, the crime is breach of trust and embezzlement; as when a person appropriates a sum of money given to him for the purpose of paying accounts, or when a bank agent, who knows he has no money at his credit, uses his position to obtain an overdraft, or when directors of a bank fraudulently put the funds of depositors to a wrong use.[5] The punishment is penal servitude or imprisonment.

Subsection (9).—*Falsehood.*

384. Falsehood is a generic term, and includes all those offences of which the essential characteristic is, that there is either a fraudulent imitation of the truth or a fraudulent suppression of the truth, to the prejudice of another. The essence of these offences is fraudulent deception. It is obvious that there may be many species of falsehood and an exhaustive classification is not easy. Some of these species have definite names of their own, as for example forgery. Other species of fraudulent deception, such as coining and bankruptcy frauds, have in the course of time tended to become divorced from the underlying idea of fraud and are usually considered separately. The following classification will be followed here: (*first*) falsehood by writ which is divided into (*a*) forgery,[6] and (*b*) falsehood by fabricated writings where there is no forgery;[7] and (*second*) such fraudulent deception as does not fall under the first head and has not, like coining, achieved a category of its own. This type of crime is popularly known as swindling, which is not, however, a term known to the law of Scotland. The term usually employed is "falsehood, fraud, and wilful imposition."[8]

Subsection (10).—*Forgery.*[9]

385. Forgery is the most serious mode of committing crime by falsifying writings. It may be defined as the fabricating and uttering

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[1] *H.M. Adv.* v. *Lawrence*, 1872, 2 Coup. 168.

[2] *M'Kinlay*, 1836, 1 Swin. 304; *Reeves*, 1843, 1 Broun 612; *Campbell*, 1845, 2 Broun 412; *Duncan*, 1849, J. Shaw 270; *Crossgrove*, 1850, J. Shaw 301; *M'Leod*, 1858, 3 Irv. 79; *Macdonald*, 1860, 3 Irv. 540.

[3] *H. M. Adv.* v. *Lee*, 1884, 12 R. (J.) 2; 5 Coup. 492. [4] *Edgar* v. *Mackay*, 1926, J.C. 94.

[5] *Climie*, 1838, 2 Swin. 118; *H.M. Adv.* v. *City of Glasgow Bank Directors*, 1879, 6 R. (J.) 19; 4 Coup. 161; *H.M. Adv.* v. *Scott*, 1879, 6 R. (J.) 37; 4 Coup. 227; *Elder* v. *Morrison*, 1881, 4 Coup. 530; *H.M. Adv.* v. *Fleming*, 1885, 12 R. (J.) 23; 5 Coup. 552.

[6] Para. 385, *infra*. [7] Para. 394, *infra*. [8] Para. 396, *infra*.

[9] Hume, i. 137; Alison, i. 423; Macdonald, p. 70 *et seq.*; Anderson, p. 197.

as genuine of a writing feloniously intended to represent the genuine writ of another. The term falsehood, when applied to writings, does not necessarily signify that these writings contain untrue statements. A writing is none the less forged though it does not contain a single untruth. A writ is false in law not because it contains falsehoods, but because it bears to be what it is not. The statements contained in the writ may be true, yet the writ itself be false, as where a person having lost an I.O.U. fabricates another to take its place. The crime consists in the putting forth of the false writ as the genuine writ of another person.[1] Fabrication is only the initial or preparatory step in the commission of the crime of forgery. The crime is not completed till the fabricated writ has been uttered as genuine.[2] Except in certain cases which are dealt with by statute,[3] a man may fabricate and falsify writings as much as he pleases, provided he abstains from uttering the writs thus falsified. The result is that the Crown may competently libel uttering only but may not libel forgery only.[4]

(i) *Fabrication.*

386. It is immaterial by what means the falsification of a writ has been achieved, whether by the use of pen and ink, pencil, or engraving tools. It is also of no moment that the forgery is a clumsy one, or that a forged signature is misspelled.[5] Nor does it matter that the forged document is invalid through some informality, such as want of stamping. It does not affect the criminality of the offence that the forged writ could not be put to any practical use in Scotland, even if it were genuine. Thus a person who attempted to use in Scotland a forged English medical diploma, which the law of Scotland does not recognise as a licence to practise, was held properly charged with forgery.[6] It is sufficient that the forged writ is seriously used, though no gain may result from its use.[7] It is forgery to use a false receipt in place of a lost one, though, as a matter of fact, the sum referred to in the receipt had actually been paid. It has likewise been held to be forgery to place a false signature on the back of a deposit receipt, though such signature was not necessary to get payment of the money.[8] A writ may be falsified in one of four different ways: (1) Where the whole writ and the signature are forged. (2) Where the signature alone is forged. (3) Where unauthorised writing is placed over a genuine signature. (4) Where the body of a genuine deed, duly signed, is altered.[9]

387. If a forgery is seriously meant, and is not a mere jest, it does not affect the criminality of the offence that the false writ is not obligatory.

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[1] *Fraser*, 1859, 3 Irv. 467.

[2] *Hinchy*, 1864, 4 Irv. 561; *Barr* v. *H.M. Adv.*, 1927, J.C. 51, but see *H.M. Adv.* v. *Hutchison*, 1872, 2 Coup. 351.

[3] 45 Geo. III. c. 89; 41 Geo. III. c. 57.

[4] *Barr* v. *H.M. Adv.*, *supra.*

[5] *M'Lennan*, 1840, Bell's Notes, 56.

[6] *Myles*, 1848, Ark. 400.

[7] *Smith*, 1852, 1 Irv. 125; *Rhind*, 1860, 3 Irv. 613.

[8] *Henderson*, 1830, 5 Deas & And. 151.

[9] *H.M. Adv.* v. *Mackenzie*, 1878, 4 Coup. 50 (altering a bill of exchange); *H.M. Adv.* v. *Mann*, 1877, 3 Coup. 376 (falsifying cheque); *H.M. Adv.* v. *Forgan*, 1871, 2 Coup. 30; *H.M. Adv.* v. *Hutchison, supra.*

A different view was indicated by Lord Deas in the case of *Imrie*.[1] The institutional writers, however, are clearly of the opinion that it is unnecessary that the forged writ should be obligatory.[2]

388. It is not necessary that a person's handwriting should be imitated. It is forgery to sign one's own name with the intention of passing it off as that of a person of a similar name,[3] or to pass one's signature off as that of a partner of a firm when there is no such firm.[4] It is forgery to get a person to sign his name and then to pass it off as that of another person of the same name,[5] or to place the name of another upon a document on a false pretence that he gave authority to sign.[6] To adhibit to a document a fictitious name,[4] or the name of a dead person,[7] or of one who cannot write,[8] is forgery. It is forgery to sign by initials or mark and pretend the subscription is that of another.[9] And it does not matter whether or not this was the usual mode of subscription of the person whose signature the false writ purports to exhibit.[10]

389. If the body of a deed, genuinely signed, is materially altered, this is forgery.[11] So also if a genuine signature is cut off from one deed and affixed to another, which is thereafter used as genuine. It is also forgery if unauthorised writing is placed over a genuine signature.[12] The filling up in writing of a blank army protecting certificate, the object being to protect the possessor from apprehension as a deserter, amounts to forgery.[13] A bill-stamp, however, signed blank, may be filled up for any amount which the stamp will cover, there being an implied mandate by the subscriber to do this. But it is forgery if a bill is mutilated so as substantially to change the obligation it creates.[14] There is no forgery, however, if what is written was intended or understood by the subscriber to be written, even though what has been written is false.[15] It is forgery if, by means of false representations, notaries and witnesses have been induced to sign a deed as for a third party.[16] If notaries sign a deed on a fictitious narrative that they have been authorised to do so, the crime is forgery.

(ii) *Uttering.*

390. The crime of forgery is not complete until the forged document is uttered, that is, is feloniously used as genuine.[17] Proof of uttering is

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[1] 1863, 4 Irv. 435.

[2] Hume, i. 140; Alison, i. 383; see also Macdonald, p. 73; *M'Leod*, 1858, 3 Irv. 79; *Rhind*, 1860, 3 Irv. 613; *H.M. Adv.* v. *Cregan*, 1879, 4 Coup. 313; *H.M. Adv.* v. *Daniel*, 1891, 3 White 103.

[3] *Menzies*, 1849, J. Shaw 153; *Duncan*, 1850, J. Shaw 334.

[4] *Hall*, 1849, J. Shaw 254.

[5] *Hendry*, 1839, Bell's Notes, 49.

[6] *Taylor*, 1853, 1 Irv. 230.

[7] *Aitchison*, 1833, Bell's Notes, 56.

[8] Hume, i. 141.

[9] *Humphreys*, 1839, Bell's Notes, 50

[10] *Cattanach*, 1840, 2 Swin. 505; Bell's Notes, 51; *M'Millan*, 1858, 3 Irv. 317.

[11] *H.M. Adv.* v. *Mann*, 1877, 3 Coup. 376.

[12] *Brown*, 1833, Bell's Notes, 51.

[13] *H.M. Adv.* v. *Cregan, supra.*

[14] *H.M. Adv.* v. *Forgan*, 1871, 2 Coup. 30; *Mann, supra.*

[15] *Fraser*, 1859, 3 Irv. 467.

[16] *Dougherty*, 1844, 2 Broun 159; see Macdonald, p. 76.

[17] Hume, i. 148; Alison, i. 401; *Edwards*, 1827, Shaw (Just.) 194; *Barr* v. *H.M. Adv.*, 1927, J.C. 51.

sufficient to ensure conviction, and it is immaterial that the origin of the fabrication is unknown. Uttering is complete if a false writ has been used as genuine, or an attempt has been made to use it, although no success has followed. Thus there is uttering if a forged letter is posted,[1] or a forged cheque or bill is presented at the bank;[2] or a forged deed is registered for execution or publication. It is not settled whether registration of a forged document for preservation amounts to uttering.[3] But if the forged document is given to another merely to be preserved or to be examined, there is no uttering.[4] There is uttering if a blank bill-stamp with forged signatures upon it is presented to a person to be filled up and is then discounted or kept as a security.[5] But there is probably no crime if such a document be merely handed to another to be written out.[6]

391. In order that uttering may be complete, the forged document must have been put out of possession of the accused. There is sufficient relinquishment of possession to constitute uttering, if the writ has been handed to an innocent accomplice who is deprived of it before he has put it to any use.[7] Uttering is also complete when a false deed which had been placed in another's repositories was allowed to be used as genuine after the death of this individual by the person who had it placed there.[8] There is also uttering when a forged deed is produced in a judicial process, whether this is done by the party interested or by one instructed by him.[9] It is doubtful, however, whether it is enough that the forged writ has been given or posted to an agent to be produced by him.[10]

392. The uttering must be felonious,[11] but the intent is enough, and the crime is complete, though no result follows the uttering, as when a letter is posted but never reaches the person to whom it is addressed,[12] or the letter is not used by the person who receives it.[13]

393. The crime of forgery is now invariably dealt with in the High Court of Justiciary or in the Criminal Court of the Sheriff. At one time it was a capital offence at common law, but this is no longer the case.[14] The penalty is now penal servitude or imprisonment. The Court of Session has, however, a criminal jurisdiction in cases of forgery, although this jurisdiction has not been exercised for upwards of a century. The proceedings in the Court of Session may originate by a petition and complaint at the instance of a private party, with concurrence of the Lord

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[1] *Harvey*, 1835, Bell's Notes, 57; *Jeffrey*, 1842, 1 Broun 337; *H.M. Adv.* v. *Smith*, 1871, 2 Coup. 1.

[2] *Reid*, 1842, 1 Broun 21.

[3] Hume, i. 154; Macdonald, p. 80.

[4] *Allan*, 1834, 6 Sc. Jur. 321; *Reid*, 1841, Bell's Notes, 58.

[5] *Steedman*, 1854, 1 Irv. 363; *Potter*, 1 Irv. 458.

[6] *Steedman, supra*; Macdonald, p. 80.

[7] *Aitchison*, 1835, Bell's Notes, 57.

[8] *Shepherd*, 1842, 1 Broun 325.

[9] *Adams*, 1820, Shaw (Just.) 21.

[10] *Adams, supra*; *Baillie*, 1825, Shaw (Just.) 131; *Wilson*, 1861, 4 Irv. 42.

[11] *Waiters*, 1836, 1 Swin. 273.

[12] *Harvey, supra*; and see 13 S. 1170; *Jeffrey*, 1842, 1 Broun 337; *Taylor*, 1853, 1 Irv. 230.

[13] *H.M. Adv.* v. *Smith, supra*.

[14] 1 Vict. c. 84.

Advocate, or at the instance of the Lord Advocate alone. In substance the complaint is an indictment, and must have a list of witnesses attached. It must be served on the accused, like an indictment, on an *inducie* of fifteen days. Warrant to imprison the accused, or to bring him before the Court for examination, may be granted on the petitioner's application. The usual course was to examine the accused in presence of the Court, after the process was in Court, but before commencing the proof. Then parties were heard, and judgment pronounced on the relevancy of the libel and defences. Thereafter, proof was taken, and, if it established the guilt of the accused, the forged documents were reduced and generally destroyed in presence of the Court. The Court of Session were in use to pronounce sentence when the crime committed was not judged worthy of death. When, however, a capital sentence was the appropriate punishment, the Court of Session merely reduced the deeds, found the accused guilty, and remitted him to the High Court of Justiciary for sentence.

SUBSECTION (11).—*Fabrication of Writings Short of Forgery.*

394. As already mentioned,[1] there may be falsehood by fabricated writings where there is no forgery, or where the offence is less heinous than forgery. This type of crime is not always easy to distinguish from forgery on the one hand,[2] and falsehood, fraud, and wilful imposition, where writing is used to bring about the deception, on the other. Macdonald, *inter alia*, gives the following instances: [3] false seisins and returns of executions by messengers; signatures to executions by witnesses who were not present; false certificates of marriage by clergymen or session clerks; [4] antedating a deed for a fraudulent purpose; letters expressed in the third person and fraudulently used; falsified balance-sheets being fraudulently used as true.[5] To cases of this nature the principles laid down as to forgery apply.

395. It is criminal for any person knowingly and wilfully to make false entries in the Register of Births, Marriages, and Deaths.[6]

The Seamen's and Soldiers' False Characters Act, 1906,[7] deals with falsification of Certificates of Service or Discharge, and with false statements made on enlistment in the naval, military, or marine forces of the Crown.

Granting a false certificate of vaccination bearing to be a certificate in terms of the Vaccination Act, 1863, is an offence at common law.[8]

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[1] Para. 384, *supra*.

[2] Cf. *H.M. Adv.* v. *Mackenzie*, 1878, 4 Coup. 50; *H.M. Adv.* v. *Hutchison*, 1872, 2 Coup. 351.

[3] Macdonald, p. 78.

[4] *Gibson*, 1848, Ark. 489.

[5] *H.M. Adv.* v. *The City of Glasgow Bank Directors*, 1879, 4 Coup. 161.

[6] 17 & 18 Vict. c. 80, s. 60; *Greig*, 1856, 2 Irv. 357; *Askew*, 1856, 2 Irv. 491; *H.M. Adv.* v. *Kinnison*, 1870, 1 Coup. 457.

[7] 6 Edw. VII. c. 5.

[8] *H.M. Adv.* v. *Webster*, 1872, 2 Coup. 339.

SUBSECTION (12).—*Falsehood, Fraud, and Wilful Imposition.*[1]

396. Fraudulent conduct, which is punishable as criminal, is described in popular language as swindling or cheating. The essence of the offence consists in the employment of falsehood as the means of attaining a desired end. At the bottom there is involved, in the notion of fraudulent deception, some sort of representation by which the deceiver conveys to the deceived a false impression. The representation may be directly made, as when a lying story is told, or where something is sold under a false description; or again, the representation may be implied, as where a person obtains goods without intending to pay for them. In the latter case he tacitly holds himself out as an ordinary buyer. So, too, the user of false weights tacitly represents himself as an honest trader. There is no limit to the variety of forms in which this crime may present itself, and no exhaustive classification is possible.

397. One well-known type of fraud is the assumption of a false character. It is criminal to assume the character of a public official, such as a notary, clergyman, exciseman, tax-gatherer,[2] or sheriff-officer.[3] It is a crime if an officer who is under suspension persists in discharging his official duties.[4] Again, it is an offence to personate another in order that the personator may obtain some advantage. Thus, personation of another in a Court of Justice is a crime at common law.[5] To personate a tradesman in order to get goods, or the owner of goods in order to get delivery, is criminal.[6] It is likewise criminal to personate a collector for a public office or charity,[2] or the agent or servant of a person in order to obtain goods.[7] It is a crime to pretend to be a farmer so as to sell horses as sound which are unsound;[8] or to be a pensioner, in order to get payment of a pension or to obtain credit;[9] or to be a person of means or position, in order to get credit.[10] The False Personation Act, 1874,[11] makes it criminal for anyone falsely and deceitfully to personate any person, or the heir, executor or administrator, wife, widow, next-of-kin, or relation of any person with intent fraudulently to obtain any land, estate, or property.

398. So, also, to tell falsehoods to obtain advantage is criminal. There are numerous examples of such offences. Begging falsehoods and false representations in advertisements[12] are typical. Fortune-telling may become a form of fraud, but intent to deceive must be libelled.[12] The sending of false betting information or the fabrication or misrepre-

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[1] Hume, i. 174; Alison, i. 364; Macdonald, p. 82; Anderson, p. 193.
[2] *Cruickshank*, 1829, Shaw (Just.) 227.
[3] *M'Innes*, 1836, 1 Swin. 198.
[4] *Millar*, 1843, 1 Broun 529.
[5] *Rae*, 1845, 2 Broun 476.
[6] *Michael*, 1842, 1 Broun 472; *Hardinge*, 1863, 4 Irv. 347.
[7] *Walker*, 1839, Bell's Notes, 64.
[8] *Hood*, 1853, 1 Irv. 236.
[9] *Meldrum*, 1838, 2 Swin. 117.
[10] *M'Gregor*, 1846, Ark. 49; *Kronacher*, 1852, 1 Irv. 62; *H.M. Adv.* v. *Macleod*, 1888, 16 R. (J.) 1; 2 White 71.
[11] 37 & 38 Vict. c. 36, s. 1.
[12] *H.M. Adv.* v. *Allan*, 1872, 2 Coup. 402; *Smith* v. *Neilson*, 1896, 23 R. (J.) 77; 2 Adam 145. Fortune-tellers also fall under 5 Geo. IV. c. 83, s. 4, and 34 & 35 Vict. c. 112, s. 15.

sentation of such information is a frequent form of fraud.[1] Hume instances the cases of apprentices and men who are diseased obtaining the enlistment bounty by stating falsely in the former case that they were not apprentices, and in the latter case that they were sound.[2]

399. Another well-known type of fraud is obtaining goods or money by means of false representations. Thus it is criminal by personating another, or on the false pretence of authority received, to obtain delivery from a carrier of a parcel addressed to another, or to obtain from the Post Office and to open a letter addressed to another;[3] or to overcharge postage and appropriate the overcharge.[4] It is criminal to obtain goods or money by means of a cheque when the person using the cheque knows that he has no funds in bank with which to meet the cheque.[5] The indictment must set forth that delivery was in part obtained by means of the worthless cheque.[6] But if there is no intent to defraud there is no crime in drawing a cheque although it happen that there are no funds to meet it.[7]

400. The false representations, however, in order to make the offence criminal, must have reference to a past or present fact, and not solely to future time.[8]

So too representations cannot form the basis of a criminal complaint if they deal not with the subject of the negotiations but merely with collateral matters.[9] False representations as to the quality of goods sold are criminal.[10] It is criminal to pretend that an article is genuine, and to try to pass it off as such, when it is not.[11] But it is not a crime to sell something in excess of its value.[12] It is fraud if a servant induce his master to become his cautioner by representing that he will continue in his master's service when he does not intend to do so.[13] It is not necessary that representations be expressly made, as for example when a person obtains goods or lodgings without the intention of paying for them.[14]

401. Another distinct branch of the crime is found in reference to deeds. It is a crime to vitiate in an essential part and to the prejudice of others any genuine deed.[15] The crime consists in the vitiation of the

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[1] *Wood* v. *H.M. Adv.*, 1899, 2 F. (J.) 6; 3 Adam 64; *Clayton* v. *H.M. Adv.*, 1906, 8 F. (J.) 41; 5 Adam 12; and cf. *H.M. Adv.* v. *Hodkinson*, 1903, 4 Adam 219; 11 S.L.T. 62.

[2] Hume, i. 174. [3] Hume, i. 175. [4] *Reeves*, 1843, 1 Broun 612.

[5] *H.M. Adv.* v. *Witherington*, 1881, 8 R. (J.) 41; 4 Coup. 475.

[6] *Mather* v. *H.M. Adv.*, 1914 S.C. (J.) 184; 7 Adam 525.

[7] *Rae* v. *Linton*, 1874, 2 R. (J.) 17; 3 Coup. 67.

[8] *H.M. Adv.* v. *Hall*, 1881, 8 R. (J.) 28; 4 Coup. 438.

[9] *Strathern* v. *Fogal*, 1922, J.C. 73.

[10] *Lloyd* v. *H.M. Adv.*, 1899, 1 F. (J.) 31; 2 Adam 637; *Turnbull* v. *Stuart*, 1898, 25 R. (J.) 78; 2 Adam 536; *J. & P. Coats, Ltd.* v. *Brown*, 1909 S.C. (J.) 29; 6 Adam 19.

[11] *Bannatyne*, 1847, Ark. 361; *Paton*, 1858, 3 Irv. 208.

[12] *Tapsell* v. *Prentice*, 1911 S.C. (J.) 67; 6 Adam 354.

[13] *Macleod* v. *Mactavish*, 1897, 25 R. (J.) 1; 2 Adam 354.

[14] *Smith*, 1839, 2 Swin. 346; *Mackintosh*, 1840, 2 Swin. 511; *Harkins*, 1842, 1 Broun 420; *Hall and Ors.*, 1849, J. Shaw 254; *Kronacher*, 1852, 1 Irv. 62; *H.M. Adv.* v. *Rodger*, 1868, 1 Coup. 76; *H.M. Adv.* v. *Bradbury*, 1872, 2 Coup. 311; *H.M. Adv.* v. *Witherington*, *supra*; *H.M. Adv.* v. *Hall*, *supra*.

[15] *Fraser*, 1859, 3 Irv. 467; *H.M. Adv.* v. *Hutchison*, 1872, 2 Coup. 351.

deed, and is complete the moment this has been effected. No uttering of the document is necessary, as in the case of forgery, to make the crime complete. Thus it is criminal fraudulently to add a figure to the sum set forth in a cheque;[1] to fill in a testing clause with a false date;[2] to insert in a deed any unauthorised provisions;[3] or to conceal defalcations by making false entries in business books.[4] It is also criminal to destroy or mutilate documents and business books wilfully and fraudulently.[5]

402. It is a statutory offence,[6] as well as one at common law, to use false weights and measures. The deviation must be from a legal standard, must be a substantial deviation, and must have been in the knowledge of the person who used the false weights or measures.

403. It is not always easy to say at what stage a fraudulent action becomes criminal.[7] In the case of verbal fraud the general rule is that some result must follow a false verbal statement, shewing that the imposition has been successful, in order that it may amount to a crime. The only exceptions to this rule are where one has maliciously accused another of committing a crime (in which case the offence is complete when the falsehood is uttered), and cases provided for by statute, such as those of persons professing sorcery or witchcraft. When the fraud is of a written character, uttering is, as a rule, the crucial point. If a document, such as a certificate of character, is fabricated, the crime is complete the moment the document is uttered.[8] Even if the writ is genuine, a crime may be committed by uttering it, as in the case of false executions, false certificates of banns of marriages, or of successful vaccination.[9] If, however, a genuine private document is despatched, even though it contain falsehoods, no crime is committed until some result ensues, brought about by the falsehoods. Where the fraud can be perpetrated by the actings of a party (practical fraud), some overt act is necessary to make it criminal. Thus where, with the view of obtaining some advantage, an article is fraudulently displayed as genuine when it is not so, a crime has been committed. It is criminal to offer for sale adulterated oatmeal as if it were unadulterated,[10] or to enter for a prize competition cattle with inflated skins and false horns.[11] In these cases the objection was overruled that no result had followed the fraud—that no advantage had been gained by means of it. The last two cases may be contrasted with that of *Hood*,[12] in which unsound horses were sold as sound by one who pretended to be a farmer when he was not. In this case the crime was not complete till the horses were actually sold, and advantage thus gained by the fraud. In a recent case[13] it was held that

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[1] *H.M. Adv.* v. *Hutchison*, 1872, 2 Coup. 351. [2] *Stalker*, 1844, 2 Broun 70.
[3] Hume, i. 160. [4] *Gray*, 1827, Syme 254.
[5] *Murray and Scott*, Bell's Notes, 66; *Reid*, 1835, *ibid.*; *Dunipace*, 1842, 1 Broun 506; *Malcolm*, 1843, 1 Broun 620; *Rattray and Ors.*, 1848, Ark. 406.
[6] 41 & 42 Vict. c. 49; 52 & 53 Vict. c. 21; 4 Edw. VII. c. 28.
[7] Macdonald, p. 87; Anderson, p. 195 *et seq.* [8] *Taylor*, 1853, 1 Irv. 230.
[9] *H.M. Adv.* v. *Webster*, 1872, 2 Coup. 339; Macdonald, p. 87.
[10] *Bannatyne*, 1847, Ark. 361. [11] *Paton*, 1858, 3 Irv. 208.
[12] 1853, 1 Irv. 236. [13] *Adcock* v. *Archibald*, 1925, J.C. 58.

a fraud may be committed although in the result the person defrauded may not have suffered pecuniary loss, or the accused obtained actual gain. Any definite practical result achieved by the fraud is enough. Under the category of practical fraud may also be classed all cases of vitiation of deeds, concealment of property by an insolvent person, or by a solvent person pretending to be insolvent,[1] and such like cases. Here the crime is complete when an overt act has been committed, combined with an intent to defraud.[2]

404. A judgment of a full bench of the High Court of Justiciary declared that the words "falsely and fraudulently" do not require to be inserted in a charge whose language implicitly libels the crime of falsehood, fraud, and wilful imposition.[3] It is competent to libel, as an aggravation of fraud and cheating, and of all other offences falling under the general head of falsehood, fraud, and wilful imposition, a previous conviction of any crime inferring dishonesty.[4] The punishment of fraud is fine, imprisonment, or penal servitude.

Subsection (13).—*Fire-raising.*

405. Fire-raising is the term used in Scotland to denote the criminal application of fire to inanimate objects. It corresponds generally with the English term "arson," and includes several offences of varying degrees of gravity. Most of these are prosecuted at common law, but charges also arise under the Acts 13 Geo. III. c. 54, s. 4 (burning heath), and 29 Geo. III. c. 46 (burning ships, goods in the loom, etc.).

(i) *Wilful Fire-raising.*[5]

406. This, the most heinous form of the crime, is constituted by a combination of the following circumstances:

(*a*) When the person accused has raised fire, without any lawful object, but with the deliberate intention of destroying certain premises or things, whether directly [6] by the application of fire to such premises or things, or indirectly [7] by its application to something contained in, forming part of, or communicating with them.

(*b*) When the accused person intended in this way to destroy premises or things of the following description, viz.: a dwelling-house (inhabited or uninhabited), shop, warehouse, stable, barn or other building, a ship, corn in the field, corn

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[1] *Clendinnen* v. *Rodger*, 1875, 3 R. (J.) 3; 3 Coup. 171.

[2] *Dick and Lawrie*, 1832, 5 Deas & And. 513; *M'Intyre*, 1837, 1 Swin. 536; *Kippen*, 1849, J. Shaw 276.

[3] *H.M. Adv.* v. *Swan*, 1888, 16 R. (J.) 34; 2 White 137.

[4] 50 & 51 Vict. c. 35, s. 63.

[5] Hume, i. 125 *et seq.*; Alison, i. 429 *et seq.*; Macdonald, p. 110; Anderson, p. 212.

[6] *H.M. Adv.* v. *Smillie*, 1883, 5 Coup. 287; 10 R. (J.) 70.

[7] *H.M. Adv.* v. *Pollock*, 1869, 1 Coup. 257; *Rosenberg*, 1842, 1 Broun 266.

in store or in the stackyard, growing woods, underwoods, or a coal-heugh.[1]

(*c*) When such premises or things were the property of a person other than the accused, or, if they belonged to him, were in the occupation of another, *e.g.* a tenant or a liferenter.[2]

(*d*) When the fire thus kindled has laid hold of or spread to and consumed some part of, or fixture in, the premises or things the incendiary intended to destroy (*e.g.* floor, door, joist, lining, sarking, thatch, etc.). If the fire has in this way taken effect, it is immaterial how small the part burned may be, or for how short a time the flames may have continued.[3]

407. If fire be kindled so as to manifest an intention that it shall spread to a subject, to set fire to which involves the pains of fire-raising, and it do so spread, the crime is complete.[4] If fire is indirectly applied, destructive intent is inferred from such conduct as indicates utter disregard of the likelihood of the flames spreading—*e.g.*, where a person, meaning to destroy his neighbour's heath, sets fire to furze, and the flames spread to and consume corn or buildings; or where a mob drags the furniture from a house, piles it in the street, and sets it alight, with the result that the house is burned.

408. A man is not guilty of wilful fire-raising by setting on fire his own property, provided that it is not in the occupation of another, is not insured, and does not in burning endanger the lives or property of others.[5] It is not settled whether a person, setting fire to his own property over which a creditor holds a heritable security, commits wilful fire-raising;[6] but it is not enough that a creditor has attached by a sequestration or poinding moveable subjects burned.[7]

(ii) *Fire-raising to Defraud Insurers.*[8]

409. This differs from wilful fire-raising in respect that (*a*) the act must have been done with intent to defraud an insurer;[9] (*b*) it extends to all premises or things capable of being insured against loss by fire;[10] and (*c*) it includes setting fire to the property of the person accused.[11] In a charge of this kind evidence is admitted to shew that at the time of the fire the accused's affairs were embarrassed;[12] and that previous to that

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[1] Hume, i. 131; Alison, i. 440; *Vallance*, 1846, Ark. 181; *M'Bain*, 1854, 1 Irv. 461; *Angus* v. *H.M. Adv.*, 1905, 8 F. (J.) 10; 4 Adam 640; cf. *Ross*, 1822, Shaw (Just.) 79.

[2] Hume, i. 132; Alison, i. 436. An indictment, where a tenant was charged with the crime but the owner of the premises burned was not set forth, was held irrelevant (*Mackirdy*, 1856, 2 Irv. 474).

[3] *Arthur*, 1836, 1 Swin. 124; *Grieve*, 1866, 5 Irv. 263; *Pollock*, *supra*.

[4] *Arthur*, *supra*; Macdonald, p. 111.

[5] *Black*, 1856, 2 Irv. 575, 583.

[6] Macdonald, p. 111.

[7] *Lawson*, 1865, 5 Irv. 79.

[8] Hume, i. 134; Alison, i. 438; Macdonald, p. 112; Anderson, p. 213.

[9] *H.M. Adv.* v. *Paterson*, 1890, 2 White 496; *M'Atamney*, 1867, 5 Irv. 363.

[10] *M'Atamney*, *supra*; *M'Creadie*, 1862, 4 Irv. 214.

[11] *Little*, 1857, 2 Irv. 624, following *Arthur*, *supra*.

[12] *Rosenberg*, 1842, 1 Broun 266.

time he had removed from his premises goods which had been insured.[1] If intent to defraud a specified insurer is set forth in the indictment, it is not necessary to state specifically that the premises were insured, what interest the accused had in the policy, or who benefited by the proceeds of the fraud.[2]

(iii) *Wicked Culpable and Reckless Fire-raising.*

410. This differs from wilful fire-raising in respect that the person accused has in this instance raised fire without the deliberate intention of destroying premises or things, but either while he was engaged in some unlawful act, or while he was in such a state of passion, excitement, or recklessness, as not to care what result might follow from his acts.[3] It is not in ordinary circumstances criminal to set fire to premises or things by mere accident or want of due care.[4]

(iv) *Minor Offences and Attempts.*

411. These are prosecuted on indictment if they are serious, while less heinous cases are charged as malicious mischief or breach of the peace. Thus a person setting fire to his own property to the danger of his neighbour, although the fire was not meant to spread, and did not in fact spread;[5] a person maliciously setting fire to his neighbour's outhouse, shed, hay-stack, peat-stack, wood-heap, heath, furze, moss, etc., when the thing fired is detached from, and nowise endangers subjects of the description specified above;[6] a person soliciting or exciting to acts of fire-raising others who refuse to be concerned in such acts; or a person threatening to destroy property by fire, but making no attempt to execute his threat, is guilty of a crime.[7] The attempt to commit any form of fire-raising is an indictable crime.[8]

412. Fire-raising is no longer capital, and may be tried in the Sheriff Court.[9] The forms of charge are statutory.[10] It is not necessary to specify in the statement of charge the particular means used in applying fire.[11] A charge stated in these words, "You did set fire to a stack wilfully," is a good charge of crime, and a verdict following upon it, "Guilty of fire-raising as libelled," is a valid one.[12]

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[1] *M'Creadie*, 1862, 4 Irv. 214.

[2] Criminal Procedure Act, 1887, Sched. A; *H.M. Adv.* v. *Paterson*, 1890, 2 White 496; cf. *M'Atamney*, 1867, 5 Irv. 363.

[3] Hume, i. 128; Alison, i. 433; *Phaup*, 1846, Ark. 176 (malicious mischief); *Macbean*, 1847, Ark. 262; *Fleming*, 1848, Ark. 519; *Stewart*, 1856, 2 Irv. 359; *H.M. Adv.* v. *Martin*, 1876, 3 Coup. 274; *H.M. Adv.* v. *Smillie*, 1883, 10 R. (J.) 70; 5 Coup. 287.

[4] *Stewart, supra; Smillie, supra.*

[5] Hume, i. 134; Alison, i. 438; *Arthur*, 1836, 1 Swin. 124.

[6] Hume, *ibid.*; Alison, i. 432, 442.

[7] Hume, i. 136; Alison, i, 442.

[8] Criminal Procedure Act, 1887, s. 61; *Douglas*, 1827, Syme 184.

[9] 1887 Act, s. 56.

[10] *Ibid.*, s. 2 and Sched. A.

[11] *Rosenberg*, 1842, 1 Broun 266.

[12] *Angus* v. *H.M. Adv.*, 1905, 8 F. (J.) 10; 4 Adam 640.

413. The prosecutor can seldom adduce the evidence of persons who saw the accused apply fire. Almost invariably his case is made up of circumstantial evidence: for example (1) that the accused was the last person to leave the premises; (2) that when the fire was discovered, the fastenings of the premises were intact; (3) that fire was found to be burning in two or more separate and disconnected places; (4) that the accused placed obstacles in the way of the police entering the premises, or making an inspection of them; (5) that preparations had been made for a fire by collecting combustible and inflammable material in an unnecessary place, or by deliberately setting lighted candles, gas, or lamps in a position designed to raise fire; (6) that the accused was exposed to a criminal charge, and had an interest in the destruction of books, papers, or other real evidence then on the premises; (7) that the accused recently before the fire clandestinely removed a quantity of valuable articles from the premises; and (8) in the case of insured property, that he was in financial difficulties. The punishment varies from penal servitude in grave cases, to a small fine, or even an admonition, in trivial ones.

Subsection (14).—*Malicious Mischief.*[1]

414. This term denotes the common-law crime of feloniously injuring property. The essence of the crime is the malice which prompts the injurious act. There must, of course, be some damage done, but the extent of injury is immaterial, so long as it is at all substantial, and the result of a malicious act. Ordinary cases of malicious mischief, which may be prosecuted at common law, are such as these: breaking windows, injuring trees or plants, destroying buildings, cutting up turf, throwing down corn-stacks, firing stacked wood or peats, breaking implements of labour, destroying or maiming domestic animals,[2] maliciously placing any obstruction on a railway, or wilfully doing so in a manner calculated to obstruct.[3]

415. Hume points out that the crime of malicious mischief is committed whether the injury to property has been caused from motives of malice or misapprehension of right. He adds, however, that, in the latter case, the damage done must have been with circumstances of tumult and disorder, and of contempt and indignity to the owner.[4] This view of Hume has been substantiated by decision, and it is now the law that no charge of malicious mischief will lie against a person who vindicates a civil right in a manner which cannot be characterised as riotous and disorderly. Thus where a fence has been erected by magistrates across the only access to a person's property, which had been possessed

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[1] Hume, i. 122; Alison, i. 448; Macdonald, p. 115; Anderson, p. 214.

[2] *H.M. Adv.* v. *Thomson*, 1874, 2 Coup. 551; *H.M. Adv.* v. *Steuart*, 1874, 2 Coup. 554.

[3] *Miller*, 1848, Ark. 525; *Murdoch*, 1849, J. Shaw 229. Obstructing engines or carriages is an offence under 3 & 4 Vict. c. 97, s. 15; Macdonald, p. 116. See para. 416, *infra*.

[4] i. 122.

for time immemorial, a conviction for malicious mischief for pulling it down was quashed.[1] But the assertion of a right-of-way may not be enough to entitle the assertor to knock down a wall even though the wall is old and of little value, and there is no disorderly conduct proved.[2] In an earlier case the servants of the buyer of wood refused to unload their master's cart at the command of the seller, who desired to retain the wood till it was paid for. The seller thereupon cut the harness, but it was held that his conduct in so acting did not amount to malicious mischief.[3] Even where property is injured for a fraudulent purpose the crime may not amount to malicious mischief. Thus the charge of malicious mischief was held irrelevant in a case where a farmer was charged with breaking beams in a farmhouse in order to increase a claim for compensation.[4] Breaking down fences is a crime at common law.[5]

416. By certain statutes malicious mischief, in certain circumstances, is made a statutory offence. It is a criminal offence wilfully to do or cause to be done anything in such manner as to obstruct any engine or carriage using any railway, or to endanger the safety of persons conveyed in or upon the same, or to aid or assist therein. To make a good charge under this statute there must have been actual obstruction or imminent danger.[6] It is criminal to use any instrument to damage or destroy, by cutting or otherwise, the fishing implements of a fishing-boat, or to take or have on board any instrument which is serviceable only, or is intended, for such purposes.[7] Where there is danger of fouling, such cutting is not criminal.[8] To manufacture implements for such purposes is criminal.[9] The statutory penalty for violation of these provisions is a fine not exceeding £50, or, in the discretion of the Court (Summary), imprisonment for a term not exceeding three months, with or without hard labour, the prohibited instrument being forfeited.

417. It is criminal to put fire, or an explosive substance, or any dangerous, filthy, noxious, or deleterious substance, or any fluid in a post letter-box;[10] or to send by post explosive, inflammable, or deleterious substances.[11] Any person contravening these sections is liable, on summary conviction, to a fine not exceeding £10, and on conviction on indictment, to imprisonment, with or without hard labour, for a period not exceeding twelve months. It is a crime for a person unlawfully or wilfully, or by culpable negligence, to break or injure any submarine cable in such a manner as might interrupt or obstruct, in whole or in part, telegraphic communication, unless the injury is done to preserve life or limb or a vessel.[12] The penalty (*a*) for wilful contravention of this section is penal servitude for a term not exceeding five years, or imprisonment, with or without hard labour, for a term

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[1] *Black* v. *Laing*, 1879, 7 R. (J.) 1; 4 Coup. 276.
[2] *Forbes* v. *Ross*, 1898, 25 R. (J.) 60; 2 Adam 513.
[3] *Speid* v. *Whyte*, 1864, 4 Irv. 584.
[4] *Reid*, 1833, Bell's Notes, 47.
[5] *H.M. Adv.* v. *M'Leod*, 1888, 2 White 9.
[6] 3 & 4 Vict. c. 97, s. 15. See note 3, p. 165, *supra*.
[7] 46 & 47 Vict. c. 22, s. 5.
[8] *Ibid.*, Sched. I. 20 and 21.
[9] *Ibid.*, s. 9.
[10] 47 & 48 Vict. c. 76, s. 3.
[11] *Ibid.*, s. 4.
[12] 48 & 49 Vict. c. 49, s. 3.

not exceeding two years, and a fine either in lieu of or in addition to such penal servitude or imprisonment; (*b*) for contravention of the section caused by culpable negligence, imprisonment for a term not exceeding three months without hard labour, and a fine not exceeding £100, either in lieu of or in addition to such imprisonment.

418. There are also certain old Scots Acts anent the planting and enclosing of ground. The Acts 1661, c. 39 and c. 41, punish those destroying plantations and enclosures, and prohibit the allowing of cattle therein. The Act 1685, c. 39, prohibits the destruction of trees. These Acts must now be regarded as in desuetude, and the offences which they set up would probably fall under the category of malicious mischief.[1] There is also the well-known Winter Herding Act (1686, c. 11), which was designed to encourage the proper herding of bestial, and which penalises those who allow their animals to stray into their neighbours' enclosures.[2] It was formerly a capital crime maliciously to break or destroy ploughs or plough-gear in time of tilth; to kill, gore, or hough oxen, horses or other cattle at the same season, or in harvest-time; or to break or destroy mills;[3] to destroy certain woollen goods in the loom or on the rack, or to destroy the apparatus used in the manufacture of these goods.[4] These statutes are in desuetude, and the offences which they penalise would now be prosecuted at common law.

419. Attempt to commit malicious mischief is now a competent charge.[5] Formerly it was doubted whether attempt to commit this crime was a relevant charge at common law.[6] Malicious mischief is aggravated, like other crimes, by previous convictions. It may also be aggravated by intent, as where the crime was committed with intent to concuss masters or workmen.[7] It has been held to be an aggravation that the malicious mischief was committed by means of housebreaking.[8]

Subsection (15).—*Trespass.*

420. Certain kinds of trespass have been rendered criminal by the Trespass Act, 1865,[9] which provides (s. 3) that "every person who lodges in any premises, or occupies or encamps on any land being private property, without the consent and permission of the owner or legal occupier of such premises or land, and every person who encamps or lights a fire on or near any private road or enclosed or cultivated land, or in or near any plantation, without the consent of the owner or legal occupier of such road, land, or plantation, or on or near any turnpike road, statute labour road, or other highway, shall be guilty of an offence punishable" with a penalty not exceeding twenty shillings or fourteen

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[1] Hume, i. 122; Alison, i. 448; Ersk. iv. 4, 39. Cases in Morison's Dict., *s.v.* "Planting and Enclosing."
[2] *Grant* v. *Hay*, 1888, 2 White 6.
[3] Acts 1581, c. 110, and 1587, c. 83.
[4] 29 Geo. III. c. 46.
[5] 50 & 51 Vict. c. 35, s. 61.
[6] *Duthie*, 1849, J. Shaw 227.
[7] *Barr*, 1834, Bell's Notes, 47.
[8] *Munro*, 1831, Bell's Notes, 48; Macdonald, p. 117.
[9] 28 & 29 Vict. c. 56; Rankine, Land-Ownership, p. 144.

days for a first offence, and not exceeding forty shillings or twenty-one days for a second or any subsequent offence. Private prosecution is not allowed (s. 5), and all prosecutions must be begun within one month after the offence was committed.

421. Apart from this statute, mere trespass is not criminal.[1] The only remedy competent against the trespasser is an action of interdict against his return on a subsequent occasion. If a trespass has in fact been committed, decree of interdict will be granted and the respondent found liable in expenses. If the interdict is broken, the respondent may be punished by fine or imprisonment—not, however, for trespass but for contempt of Court.

Subsection (16).—*Piracy.*[2]

422. Piracy is a crime by the law of nations, and the High Court of Justiciary has jurisdiction to try the offence, wheresoever, or by whomsoever, it has been committed. The crime is committed: (1) Where hostilities are carried on at sea without a commission from any State. (2) Where the powers conferred by a commission are grossly and wilfully exceeded. (3) Where the ship or goods or persons on board are masterfully and illegally seized, either by strangers from without or by the crew on board. If the master of a ship in distress forcibly takes necessaries from another ship, either paying for them or promising to do so, this is not piracy. Commanders of ships or others trading with pirates shall be adjudged guilty of piracy; and persons belonging to any vessel who forcibly board any merchant ship and throw goods overboard, shall be punished as pirates.[3] These are cases of "constructive piracy," Formerly the penalty was death; but this would not now be imposed unless murder had been committed.[4] Penal servitude would be given.[5]

Subsection (17).—*Wrecking.*

423. To carry off articles from a wreck though no one is in charge is a crime.[6] If anyone is in charge, the crime would be theft or robbery according to the circumstances. Wrecking is also a statutory offence.[7]

Subsection (18).—*Poaching.*

424. Poaching [8] is the pursuit or destruction of game belonging to another without the authority of the owner. This crime has always been regarded as a serious one by the law of Scotland, and many statutes

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[1] Rankine, Land-Ownership, p. 138 *et seq.*; *Marquis of Tweedale* v. *Dalrymple*, 1778, Mor. 4992; 5 Bro. Sup. 475.

[2] Hume, i. 481; Alison, i. 638; Macdonald, p. 56; Anderson, p. 68.

[3] 8 Geo. I. c. 24.

[4] Criminal Procedure Act, 1887, s. 61.

[5] *Ibid.*, s. 56.

[6] Hume, i. 485 *et seq.*; Alison, i. 640; Macdonald, p. 57.

[7] 17 & 18 Vict. c. 104, s. 479.

[8] Macdonald, p. 189 *et seq.*; Anderson, p. 136 *et seq.*; Irvine, Game Laws; Oke, Game Laws; Tait, Game Laws; Waring, Game Laws; Rankine on Land-Ownership.

were passed by the Scots Parliament against it.[1] There are now three important Acts dealing with this matter: the Night Poaching Act, 1828;[2] the Day Trespass Act, 1832;[3] and the Poaching Prevention Act, 1862.[4] These Acts will be considered in their order. It may be pointed out, however, that the first differs from the other two in the far greater stringency of its provisions. Night poaching is regarded by the Legislature not merely as a trespass and an infringement of private right, but as an offence which, by reason of its tendency to lead to violence and outrage, falls to be severely dealt with.[5]

(i) *Night Poaching.*

425. The leading statute[6] provides[7] that if any person[8] shall by night[9] unlawfully[10] take or destroy any game[11] or rabbits[12] on any land, whether open[13] or enclosed,[14] or shall by night unlawfully enter or be on any land, whether open or enclosed,[15] with any gun, net, engine, or other instrument[16] for the purpose of taking or destroying game,[17] such

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[1] One of the last Acts passed before the Union (1707, c. 13) subjected common fowlers hunting without a prescribed warrant from the landowner to a penalty of £20 Scots, besides forfeiture of their dogs, guns, and nets, and prohibited all persons from coming within any heritor's ground, without his leave, with setting dogs and nets for killing fowls. Rankine (Land-Ownership, p. 151) says that this Act is still in observance, but it has in fact been substantially superseded by subsequent legislation.

[2] 9 Geo. IV. c. 69, as amended by 7 & 8 Vict. c. 29.

[3] 2 & 3 Will. IV. c. 68.

[4] 25 & 26 Vict. c. 114.

[5] Bell's Notes, 118; *Swanston*, 1836, 1 Swin. 54; *Reid*, 1836, 1 Swin. 202.

[6] 9 Geo. IV. c. 69.

[7] Sec. 1. It should be noted that this section does not describe different offences, but one offence which may be committed in one of two alternative ways (*Duncan*, 1864, 4 Irv. 474, overruling *Jones & M'Ewan* v. *Mitchell*, 1853, 1 Irv. 334).

[8] The offence may be committed by the agricultural tenant of the lands (*Smith* v. *Young*, 1856, 2 Irv. 402; Macdonald, p. 192; note 10, *infra*).

[9] Sec. 12 provides that night, under the Act, begins with the expiry of the first hour after sunset, and ends at the beginning of the last hour before sunrise. See *Drummond* v. *Latham*, 1892, 3 White 166. Sunrise and sunset are determined by local time (*Mackinnon* v. *Nicolson*, 1916 S.C. (J.) 6).

[10] The onus of proving permission rests on the accused (*R.* v. *Wood*, 1856, Dearsly and Bell C.C. 1). The unlawfulness of being on the land is now modified in the case of a tenant or those authorised by him with regard to hares and rabbits, which may be taken at any time, provided that firearms are not used when the taking is at night (Ground Game Act (43 & 44 Vict. c. 47), ss. 1 and 6; Macdonald, p. 192; Rankine, *supra*).

[11] Game includes hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards (s. 13); but the Act does not apply to stealing tame pheasants "under the charge of a hen," though roosting at the time on trees near the hen-coops (*R.* v. *Garnham*, 1861, 8 Cox C.C. 451).

[12] See note 10, *supra*.

[13] Where the offence charged is entering or being upon land for the purpose, etc., the charge is not made good if it appears that the ground was waste ground between the hedges bounding a public road (*R.* v. *Harris*, 1865, 12 L.T. 303). In regard to roads generally, see *infra* as to the amending Act 7 & 8 Vict. c. 29.

[14] The names of the fields in a complaint are mere surplusage (*Henderson* v. *Callendar*, 1878, 6 R. (J.) 1; 4 Coup. 120).

[15] *Kinnear* v. *Whyte*, 1868, 1 Coup. 56.

[16] The alternative charge may be proved by shewing that the accused was in company with one having a net or other instrument for the purpose stated (*Granger*, 1863, 4 Irv. 432).

[17] A complaint is bad which charges "or rabbits" where the offence is entering on land, the expression in the section under this branch being simply "game" (*Mitchell* v. *Campbell*, 1863, 4 Irv. 257).

offender shall for the first offence be imprisoned for a period not exceeding three months with hard labour, and thereafter shall find caution, himself in £10 and two sureties in £5 each, or one in £10, for not so offending again for the space of one year next following, or on failure to find caution, shall be further imprisoned with hard labour for six months, unless caution be sooner found. For a second offence the respective periods and amounts are doubled. For a third offence the sentence may be penal servitude up to seven years or imprisonment with hard labour up to two years. The owner of land or his servant or any assistant may apprehend a person caught night poaching (s. 2). If the poacher resists, and offers violence with any offensive weapon,[1] he is liable to penal servitude for seven years, or imprisonment with hard labour for two years.

426. The most serious form of night poaching is by armed bands. If any persons to the number of three or more together shall by night unlawfully enter [2] or be [3] on any land, whether open or enclosed, for the purpose of taking or destroying game or rabbits, and [4] if such persons are armed with any gun, cross-bow, firearm, bludgeon, or any other offensive weapon,[5] each and every such person shall be liable to penal servitude for a period not exceeding fourteen years, or to imprisonment with hard labour for a period not exceeding three years (s. 9). It should be noted in regard to this section that it is not sufficient that the accused were apprehended on a public road, not having been seen on the land, though shots were heard from neighbouring coverts.[6] A conviction is good though the accused laid down their arms and stole away on being observed.[7] If a common design of poaching be proved, it is enough to convict all concerned, though only one enter the land; [8] but concert must be proved as a jury question.[9]

427. The prosecution of all offences punishable summarily under the Act, viz. a first or second offence of entering or being on land for the purpose of taking game at night, and a first or second offence of taking game at night, must be commenced within six calendar months after the commission of the offence; and the prosecution of offences punish-

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[1] Large stones, though not taken to the ground, are offensive weapons (*R.* v. *Grice*, 1837, 7 C. & P. 803; *M'Nab*, 1845, 2 Broun 416; *H.M. Adv.* v. *Mitchell and Others*, 1887, 1 White 321). As to other weapons, see *R.* v. *Palmer*, 1831, 1 Moody & R. 70; *R.* v. *Fry & Webb*, 1837, 2 Moody & R. 42; *R.* v. *Merry*, 1847, 2 Cox C.C. 240; *R.* v. *Turner*, 1849, 3 Cox C.C. 304).

[2] Rankine, Land-Ownership, p. 154.

[3] Being on the land is a question of circumstances and is a jury question (*R.* v. *Worker*, 1827, 1 Moody 165; *R.* v. *Capewell and Pegg*, 1833, 5 C. & P. 549; *R.* v. *Higgs*, 1867, 10 Cox C.C. 527).

[4] It is enough if any one or more be armed, provided the others knew of the fact (*Granger*, 1863, 4 Irv. 432; *Limerick*, 1844, 2 Broun 1; *R.* v. *Smith*, 1818, Russ. & R. 368; *R.* v. *Southern*, 1821, Russ. & R. 444; *R.* v. *Goodfellow*, 1845, 1 Den. C.C. 81.

[5] See note 1, *supra*.

[6] *R.* v. *Meadham*, 1848, 2 C. & K. 633.

[7] *R.* v. *Nash*, 1819, R. & R. 386.

[8] *R.* v. *Passey*, 1836, 7 C. & P. 282; *R.* v. *Lockett*, 1836, 7 C. & P. 300; *R.* v. *Whittaker*, 1848, 1 Den. C.C. 310.

[9] *R.* v. *Nickless*, 1839, 8 C. & P. 757; *R.* v. *Jones*, 1847, 2 Cox C.C. 185.

able on indictment, must be commenced within twelve calendar months (s. 4).[1]

428. The exclusive jurisdiction to try all offences punishable summarily is in the Sheriff of the county.[2] First and second offences under s. 1 must be tried summarily. The Sheriff may not try them with a jury,[3] and his jurisdiction in regard to first and second offences is likewise exclusive of the High Court.[4] Under the Act a third offence, or any other offence where a sentence of penal servitude might be pronounced, could be tried only by the High Court of Justiciary, but trial by Sheriff and jury is now competent.[5] Prosecutions are instituted on the oath of a credible witness (s. 3). It is doubtful whether private persons may prosecute. In any event, they need to have the concurrence of the procurator-fiscal, and to set forth an interest.[6]

429. The amending Act 7 & 8 Vict. c. 29 makes the punishments and forfeiture imposed by s. 1 [7] of the leading Act on persons destroying game or rabbits by night in any open or enclosed land to apply to persons destroying game or rabbits by night on any public road, highway, or path, or the sides thereof, or at the openings, outlets, or gates from any such land into any public road, highway, or path. The like power of apprehension is given as if the offender were found upon the land. It should be noted that the amending Act applies only to the case of persons actually destroying game, not to the other offences under the leading Act; and accordingly a libel charging persons, under s. 9, with being out armed, to the number of more than three, on certain lands or on a road, is irrelevant, but the defect can be cured by deleting the reference to the road.[8] A charge of unlawfully entering a public road and then and there killing, etc., is bad because the word "unlawfully" is misplaced.[9] Although s. 1 of the leading Act creates only one offence, which may be committed in two ways, it was found that when the amending Act was prayed in aid, a general verdict of guilty on a charge of killing on the road, or being on the lands for the purpose, etc., was bad, as being cumulative.[9]

(ii) *Day Poaching.*

430. This offence is dealt with by the Day Trespass Act of 1832.[10] Sec. 1 provides that if any person shall commit any trespass by entering

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[1] *M'Nab*, 1845, 2 Broun 416; *R.* v. *Brooks*, 1847, 1 Den. C.C. 217; *R.* v. *Austin*, 1845, 1 C. & K. 621.

[2] 40 & 41 Vict. c. 28, s. 10.

[3] *Caird* v. *Evans*, 1848, Ark. 413.

[4] *Rowet*, 1843, 1 Broun 540; *Bell*, 1850, J. Shaw 348.

[5] 50 & 51 Vict. c. 35, s. 56.

[6] *Graham* v. *Duke of Buccleuch*, 1844, 2 Broun 85; *Herbert* v. *Duke of Roxburgh*, 1855, 2 Irv. 346.

[7] *Kinnear* v. *Whyte*, 1868, 6 M. 804; 1 Coup. 56.

[8] *Burns*, 1863, 4 Irv. 437.

[9] *Mains & Bannatyne* v. *M'Lullich & Fraser*, 1860, 3 Irv. 533.

[10] 2 & 3 Will. IV. c. 68. The corresponding English statute is 1 & 2 Will. IV. c. 32, s. 30.

or being in the daytime upon any land, without leave of the proprietor, in search or pursuit of game (not defined), or of deer, roe, woodcocks, snipes, quails, landrails, wild ducks, or conies (rabbits), such person shall on summary conviction be fined a sum not exceeding £2, together with the expenses of the prosecution. If the offence be committed by five persons together, or by a person or persons with the face disguised, the penalty may be as much as £5, with expenses. The oath of one credible witness is sufficient for a conviction. There may be constructive trespass, as by remaining on the road but acting in concert with others who enter the land, or by sending dogs on to the land.[1] But it has been held that where a rabbit, after being shot on the public road ran into private ground and there fell dead or moribund, the shooter in sending his dog into the private ground to retrieve it, did not commit an offence within the meaning of s. 1 of this Act.[2] Difficult cases arise as to game killed or wounded on the march between two properties.[3]

431. The Act does not apply to an agricultural tenant.[4] But the tenant's friends are in a different position. A person who resided with his sister on a farm of which she was tenant and who assisted her in the management was held not protected from the Act.[5] Nor is the son of the tenant.[6] But where rabbits were not reserved to the landlord, a son-in-law who had the tenant's authorisation to shoot rabbits and did so was held protected.[7] A friend of the tenant, though authorised to shoot rabbits but who is not one of the persons specified in the Ground Game Act, 1880, s. 1 (1), is liable to conviction.[8] The Act may apply to the tenant's servant,[9] but the authorities seem to shew that each case must be decided on its own facts.[10] The chief difficulties arise out of the killing of rabbits, but it is clear that, where there is no stipulation to the contrary in his lease, an agricultural tenant is entitled at common law, by himself or by anyone authorised by him, to destroy rabbits.[11]

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[1] *Stoddart* v. *Stevenson*, 1880, 7 R. (J.) 11 ; 4 Coup. 334 ; *Wood* v. *Collins*, 1890, 17 R. (J.) 55 ; 2 White 497, overruling *Colquhoun* v. *Liddell*, 1876, 4 R. (J.) 3 ; 3 Coup. 342. As to a public right-of-way, see *Colt* v. *Webb*, 1898, 1 F. (J.) 7 ; 2 Adam 591.

[2] *Nicoll* v. *Strachan*, 1913 S.C. (J.) 18 ; 7 Adam 31 ; *Macdonald* v. *Maclean*, 1879, 6 R. (J.) 14 ; 4 Coup. 205 ; *Kenyon* v. *Hart*, 1865, 34 L.J. (M.C.) 87 ; *Donald*, 1828, Syme 303.

[3] Rankine on Land-Ownership, p. 154, and cases there cited.

[4] *Smellie* v. *Lockhart*, 1844, 2 Broun 194, at p. 202 ; *Kinnoull* v. *Tod*, 1859, 3 Irv. 501.

[5] *Black* v. *Bradshaw*, 1875, 3 R. (J.) 18 ; 3 Coup. 209.

[6] *Porter* v. *Stewart*, 1858, 3 Irv. 57 ; *James* v. *Earl of Fife*, 1880, 7 R. (J.) 9 ; 4 Coup. 321; *Maxwell* v. *Marsland*, 1889, 16 R. J.) 48 ; 2 White 176.

[7] *M'Adam* v. *Laurie*, 1876 ; 3 R. (J.) 20 ; 3 Coup. 223.

[8] *Niven* v. *Renton*, 1888, 15 R. (J.) 42 ; 1 White 578.

[9] *Kennedy* v. *Selkirk*, 1850, J. Shaw 463. It would appear, however, from the comments on this case in *Kinnoull* v. *Tod*, *supra*, at p. 505, that the application of the Act to servants depends on circumstances.

[10] Contrast *Laurie* v. *M'Arthur*, 1880, 8 R. (J.) 2; 4 Coup. 346, with *Richardson* v. *Maitland*, 1897, 24 R. (J.) 32 ; 2 Adam 243 ; and see also *Calder* v. *Robertson*, 1878, 6 R. (J.) 3 ; 4 Coup. 131 ; *Jack* v. *Nairne*, 1887, 14 R. (J.) 20 ; 1 White 350 ; *Crawshay* v. *Duncan*, 1915 S.C. (J.) 64 ; 7 Adam 630.

[11] *Crawshay*, *supra* ; see also *Inglis* v. *Moir's Tutors*, 1871, 10 M. 204.

432. A written complaint is necessary, and may be subscribed by a law agent as prosecutor for the complainer, who may be represented by a law agent at the trial.[1] The proprietor's name must appear on the conviction.[2] The mere allegation of a right based upon alleged title, but not supported by *prima facie* evidence, will not bar a prosecution.[3] Although when five or more act in concert the penalty is £5, the prosecutor in charging five or more persons may limit himself to the lesser penalty.[4] Daytime commences one hour before sunrise, and terminates one hour after sunset (s. 3).

433. Sec. 2 provides that the trespasser may be required by the person having right to the game, or the occupier of the lands, or the servant of either of them, or by any other person authorised by either of them, to leave the land, and also to give his name and address. If he refuses to give his name and address, or gives an illusory address, or remains upon or persists in returning to the land, he may be apprehended by the person making the demand, and brought before the Sheriff, provided he is not detained more than twelve hours before this is done.[5] In this case he is liable to a penalty not exceeding £5, with expenses. The prosecution is at the instance of the owner or occupier of the lands, and the concurrence of the procurator-fiscal is not required.[6] The Act does not apply to the pursuit with hounds or greyhounds of deer, hares, or foxes, if started on other land on which the hunters were entitled to hunt (s. 4).

434. The person having right to game, or the occupier or anybody in the employment of either of them, may demand possession of the game taken, and if it is refused, may take it by force, for the use of the person entitled to the game upon the lands (s. 5). If the trespasser [7] obstructs or assaults any person in the execution of his duty under the Act, he is liable on summary conviction in an additional penalty of £5, with the option of imprisonment for a period not exceeding three months (s. 6). The fines and penalties are payable to the kirk-session of the parish where the offence was committed, for behoof of the poor (s. 7).[8] The Sheriff [9] may adjudge the fine to be paid immediately, or he may allow time for payment; and in either case he may sentence the trespasser to imprisonment for a period not exceeding two months in default of payment (s. 8).

435. Every prosecution must be commenced within three months of the commission of the offence (s. 11). The Act directs that prosecution

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[1] *M'Kenzie* v. *Maberly*, 1859, 3 Irv. 459; *Shaw Stewart* v. *Wilson*, 1881, 8 R. (J.) 33; 4 Coup. 455.

[2] *M'Kenzie, supra*, per Lord Ardmillan.

[3] *Scott* v. *Thomson*, 1887, 14 R. (J.) 45; 1 White 398; see also *Saunders* v. *Paterson*, 1905, 7 F. (J.) 58; 4 Adam 568.

[4] *Saunders, supra*; *Lees* v. *Macdonald*, 1893, 20 R. (J.) 55; 3 White 468.

[5] The offence under this section is a separate one. Rankine, Land-Ownership, p. 887.

[6] *Russell* v. *Colquhoun*, 1845, 2 Broun 572. [7] *Birrel* v. *Jones*, 1860, 3 Irv. 546.

[8] *Hume* v. *Meek*, 1846, Ark. 88, 96; *Morton* v. *Johnston*, 1867, 5 Irv. 356.

[9] 40 & 41 Vict. c. 28, s. 10.

shall be instituted on the oath of credulity of a credible witness (*ibid.*). Opinions fluctuated as to whether this procedure was permissive or directory, but the latter opinion ultimately prevailed.[1] Objection to the formality of the oath, it was held, came too late after the accused had pleaded to the complaint.[2] The portion of s. 11 requiring the oath was repealed by the Statute Law Revision Act, 1891,[3] and it seems to have been assumed in a recent case that this repeal was effective.[4] The provisions of the Act do not affect ordinary civil remedies by way of action or interdict; but any person at whose instance, or with whose concurrence or assent, proceedings have been taken, is barred from raising any action at law in respect of the same trespass (s. 16). All actions and prosecutions in respect of anything done under the Act by those charged with its execution must be commenced within six months of the act committed, and one calendar month's notice must be given to the defender before the commencement of any such action (s. 17).

(iii) *Poaching Prevention Act.*[5]

436. This Act[6] was meant to meet the case of men being found upon the public highway returning from a night of depredation laden with their spoil. No distinction is drawn, however, between night and day as in the former statutes. It provides (s. 2) that any police constable may search in any highway, street, or public place any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of a gun, or nets or engines used for killing or taking game, and also may stop and search any cart or conveyance in regard to which he shall have the like suspicion; and should any game or instrument be found, the constable may seize and detain the same. The constable shall then cause the person so searched to be brought before the Sheriff, and should the Sheriff be satisfied that the accused has obtained the game by poaching, or used the instruments for that purpose, or been accessory thereto, he may be fined in any amount not exceeding £5, and shall forfeit the game or instruments, and the Sheriff shall direct the same to be sold or destroyed, and the proceeds of sale and penalties to be paid to the treasurer of the county or borough. Should no conviction follow, the game or instruments are to be returned to the person from whom they were taken. It should be observed that the constable may not apprehend.[7] It is necessary that game or instruments for taking game

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[1] See cases quoted in the argument in the case of *M'Donald*, cited *infra*.
[2] *Munro* v. *Duke of Richmond and Gordon*, 1889, 17 R. (J.) 14; 2 White 409.
[3] 54 & 55 Vict. c. 67, s. 1.
[4] *M'Donald* v. *Milne*, 1897, 25 R. (J.) 41; 2 Adam 457; and see also *Logan* v. *Coupland*, 1863, 4 Irv. 453.
[5] Rankine, Land-Ownership, p. 898.
[6] 25 & 26 Vict. c. 114.
[7] *R.* v. *Spencer*, 1863, 3 F. & F. 857.

be found on the accused while he is actually on a street or public place. It is enough that the game or instruments are openly seen in accused's possession on the highway; but if they are not so seen, and a suspected person is followed off the highway and searched, the case does not appear to be within the Act.[1] It is no objection that the policeman does not merely suspect, but actually knows, that the accused has been poaching.[2] Proof of having been seen on land poaching is not required. It is for the judge to say whether the only reasonable inference in the circumstances of the particular case is that the accused has been poaching.[3] The onus will be heavy in the case of a common carrier.[4] For the purposes of this Act, game includes hares, pheasants, partridges; eggs of pheasants and partridges; woodcocks, snipes, rabbits, grouse, black or moor game, and eggs of grouse or black or moor game.

437. Sec. 3 provides that the procedure in prosecutions is to be the same as that under the Day Trespass Act.[5] Accordingly, there is an oath of credulity.[6] The repeal of the clause requiring the oath of credulity in the case of a prosecution under the Day Trespass Act, referred to above, has not affected this requirement in the case of a poaching prevention prosecution.[7] It has been found that there must be a fresh oath of credulity under the Poaching Prevention Act where the first oath was to facts which would have made the complaint one under the Day Trespass Act.[8] The procurator-fiscal or the police may prosecute.[9] There is no provision for private prosecution. The evidence of one credible witness may be sufficient to justify a conviction.[10]

Subsection (19).—*Hunting and Hawking.*

438. The Act 1621, c. 31, enacts that no man may hunt or hawk hereafter who hath not a plough of land in heritage, under a penalty of £100, the one-half to the King, the other half to the informer.[11] The Act appears not to be in desuetude.[12]

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[1] *Hall* v. *Knox*, 1863, 33 L.J. (M.C.) 1; *Clarke* v. *Crowder*, 1869, L.R. 4 C.P. 638; *Turner* v. *Morgan*, 1875, L.R. 10 C.P. 587; *Lloyd* v. *Lloyd*, 1885, 14 Q.B.D. 725.

[2] *Hall* v. *Robinson*, 1889, 53 J.P. 310.

[3] *M'Kenzie* v. *Lockhart*, 1890, 18 R. (J.) 1; 2 White 534; *Jameson* v. *Barty*, 1893, 1 Adam 91; 1 S.L.T. 277; *Scatterty* v. *Barclay*, 1898, 2 Adam 497; 5 S.L.T. 302; *Browne* v. *Turner*, 1863, 32 L.J. (M.C.) 106; *Evans* v. *Botterill*, 1863, 33 L.J. (M.C.) 50; see *Jenkin* v. *King*, 1872, L.R. 7 Q.B. 478; *Gillan* v. *Milroy*, 1877, 3 Coup. 551.

[4] *Lawley* v. *Merricks*, 1887, 51 J.P. 502; *Young* v. *Jameson*, 1891, 18 R. (J.) 20; 2 White 581.

[5] 2 & 3 Will. IV. c. 68, s. 11.

[6] *Trainer* v. *Johnston*, 1863, 4 Irv. 264; *Logan* v. *Coupland*, 1863, 4 Irv. 453.

[7] *M'Donald* v. *Milne*, 1897, 25 R. (J.) 41; 2 Adam 457.

[8] *Morris & Boyd* v. *Earl of Glasgow*, 1867, 5 Irv. 529.

[9] *Anderson and Holmes* v. *Cooper*, 1868, 1 Coup. 18. The fiscal cannot get expenses (*Banks* v. *Welsh*, 1899, 2 F. (J.) 11; 3 Adam 82).

[10] *Anderson* v. *Macdonald*, 1910 S.C. (J.) 65; 6 Adam 229.

[11] Kames, Abridgement, p. 125; Barclay's Digest, p. 330.

[12] *Trotter* v. *M'Evan*, 8th July 1809, F.C.; *Earl of Hopetoun* v. *Wight*, 17th January 1810, F.C.; *Oliphant* v. *Bell*, 1902, 10 S.L.T. 560.

Section 9.—Crimes relating to Bankruptcy.

439. Under the general term of Bankruptcy Frauds, as commonly used, fall the various offences against the bankruptcy laws which either at common law or by statute are punishable as crimes and offences.[1]

Subsection (1).—*Fraudulent Bankruptcy at Common Law.*

440. At common law the foundation of the crime of fraudulent bankruptcy is some act fraudulently conceived and carried out by a debtor in order to cheat his creditors. Two cases fall to be distinguished, one where the debtor is insolvent, bankrupt, or in contemplation of bankruptcy, the other where the debtor is in fact solvent. In the former case the crime is constituted where a debtor puts away his effects with the intent to defraud his creditors, but it is essential to the crime that the debtor should be insolvent, bankrupt, or in contemplation of bankruptcy.[2] The usual methods by which the crime of fraudulent bankruptcy is committed are secretion of property by actual concealment,[3] or transference to particular or pretended creditors or relatives, or disposal by fictitious sales.[4] The crime, however, as above stated, may also be committed by a solvent debtor, if he conceals his property for the purpose of enabling him to obtain sequestration on pretence of being unable to meet his engagements.[5] The essence of the crime in this case is not so much the putting away of effects, as the pretending to be insolvent.[6] A debtor may relevantly be charged alternatively under both the above-mentioned heads.[7] One who aids the debtor on the commission of the crime may be charged as art and part.[8] The trial of such offences at common law may proceed either before the High Court of Justiciary or before the Sheriff. The punishment is now penal servitude or imprisonment.[9]

Subsection (2).—*Statutory Offences.*

441. The Acts 1621, c. 18; 1696, c. 45, and the Sequestration Act of 1814, dealt with fraudulent bankruptcy, but though these Acts are still in force, in practice proceedings are no longer taken under them. During the nineteenth century fraudulent bankruptcy was dealt with

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[1] Macdonald, Criminal Law, p. 96 *et seq.*; Goudy, Law of Bankruptcy, 4th ed., p. 608 *et seq.*

[2] *Clendinnen* v. *Rodger*, 1875, 3 R. (J.) 3; 3 Coup. 171; and see *H.M. Adv.* v. *Sneden*, 1874, 1 R. (J.) 19; 2 Coup. 532.

[3] Alison, i. 570, 571; Hume, i. 509.

[4] Macdonald, *ut supra*. An indictment is not irrelevant because the pannel is charged alternatively with putting away, carrying off, or concealing his funds (*M'Rae*, 1867, 5 Irv. 463; *H.M. Adv.* v. *Cornelius*, 1884, 5 Coup. 443).

[5] *O'Reilly*, 1836, 1 Swin. 256. [6] *Clendinnen*, *supra*, per Lord Justice-Clerk Moncreiff.

[7] *H.M. Adv.* v. *Neill*, 1873, 2 Coup. 395.

[8] *Sangster* v. *H.M. Adv.*, 1896, 24 R. (J.) 3; 2 Adam 183; contrast *Robertsons* v. *Caird*, 1885, 13 R. (J.) 1; 5 Coup. 664.

[9] Macdonald, p. 97.

in various statutes.[1] These are now repealed by the Bankruptcy (Scotland) Act, 1913,[2] which consolidates the whole law relating to the subject.

442. This statute enacts (s. 161) that a debtor in a process of sequestration "shall be deemed guilty of a crime and offence. . . .

"(A) In each of the cases following, unless he prove to the satisfaction of the Court that he had no intent to defraud,[3] that is to say:

"1. If he does not, to the best of his knowledge and belief, fully and truly disclose the state of his affairs in terms of the Act.[4]

"2. If he does not deliver up to the trustee all his property, and all books, documents, papers, and writings relating to his property or affairs which are in his custody or under his control,[5] and which he is required by law to deliver up, or if he does not deal with and dispose of the same according to the direction of the trustee.[6]

"3. If, after the presentation of the petition for sequestration, or within four months next before such presentation, he conceals any part of his property, or conceals, destroys, or mutilates, or is privy to the concealment, destruction, or mutilation of any book, document, paper, or writing relating to his property or affairs.[7]

"4. If, after or within the time above specified, he makes or is privy to the making of any false entry in, or otherwise falsifying

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[1] Bankruptcy (Scotland) Act, 1856, 19 & 20 Vict. c. 79; Debtors (Scotland) Act, 1880, 43 & 44 Vict. c. 34; and Bankruptcy Frauds and Disabilities (Scotland) Act, 1884, 47 & 48 Vict. c. 16.

[2] 3 & 4 Geo. V. c. 20, s. 191 (1), and Sched. I.

[3] Intent to defraud need not be libelled or proved by the prosecutor, *Howman* v. *Mackie*, 1891, 18 R. (J.) 30; 2 White 617; *Taylor* v. *H.M. Adv.*, 1897, 24 R. (J.) 65; 2 Adam 296. In the latter case the opinion was expressed that in any event it was unnecessary to libel intent to defraud in view of s. 8 of the Criminal Procedure Act, 1887. See para. 444, *infra*.

[4] This subsection re-enacts the corresponding subsection of s. 13 of the Debtors Act, 1880. See *H.M. Adv.* v. *Simpson*, 1883, 10 R. (J.) 73; 5 Coup. 293, where Lord Justice-Clerk Moncreiff said that the indictment must set forth, "First, what the true state of affairs was; second, that the accused knew and believed it to be so; and third, that he did not disclose it." Cf. *H.M. Adv.* v. *Cornelius*, 1884, 5 Coup. 443.

[5] *Taylor* v. *H.M. Adv.*, 1897, 24 R. (J.) 65; 2 Adam 296. It is questioned whether the words "in his custody or under his control" refer only to "books, documents, papers, and writings relating to" the bankrupt's affairs, and not to "his property."

[6] Where an indictment under the corresponding section of the Debtors Act, 1880, charged the accused with not having delivered up the books, documents, papers, and writings relating to and forming the vouchers and evidents or documents of debt for certain sums specified, it was held irrelevant, in respect that it did not set forth either what the documents were, or that any such documents actually existed. Lord Justice-Clerk Moncreiff said, "If the withholding of these documents is to be treated as a specific crime, then they must either be described so as to be identified, or at least it must appear on the indictment that the prosecutor has done all he could to describe them" (*H.M. Adv.* v. *Simpson*, *supra*; see *Taylor*, *supra*).

[7] See *Taylor*, *supra*. A person not a debtor or insolvent cannot be guilty art and part of an offence under the statute (*Robertsons* v. *Caird*, 1885, 13 R. (J.) 1; 5 Coup. 664; see also para. 440, *supra*).

any book, document, paper, or writing affecting or relating to his property or affairs.

"5. If, within four months next before the presentation of the petition for sequestration, he pawns, pledges, or disposes of,[1] otherwise than in the ordinary way of trade,[2] any property which he has obtained on credit and has not paid for.

"6. If, being indebted to an amount exceeding two hundred pounds at the date of the presentation of the petition for sequestration, he has not, for three years next before such date, if he has been three years in business, and if he has been less than three years in business then from the time he commenced business, kept such books or accounts as are necessary to exhibit or explain his transactions." [3]

443. The same section provides that a debtor shall be guilty of a crime and offence:

"(B) In each of the cases following:—

"1. If, knowing or believing that a false claim has been made by any person under the sequestration, he fails for the period of a month from the time of his acquiring such knowledge or belief to inform the trustee thereof.

"2. If, after the presentation of the petition for sequestration, or at any meeting of his creditors, within four months next before such presentation, he attempts to account for any part of his property by fictitious losses or expenses.

"3. If, within four months next before the presentation of the petition for sequestration, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same.[4]

"4. If, after the date of awarding sequestration, or within four months prior thereto, he absconds from Scotland, or makes preparations to abscond, for the purpose of avoiding examination or other proceedings at the instance of his creditors, or taking with him property which ought by law to be divided amongst his creditors, to the amount of twenty pounds or upwards, or if he fails, having no reasonable excuse (after receiving due notice), to attend the public examination

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[1] The words, "pawns, pledges, or disposes of" are alternative, and it is not necessary to specify the particular mode in which the property is alleged to have been dealt with (*H.M. Adv.* v. *Wilson*, 1882, 5 Coup. 48).

[2] *Ex parte Brett*, 1875, 1 Ch. D. 151; *Reg.* v. *Thomas*, 1870, 22 L.T. (N.S.) 138.

[3] *In re Mutton*, 1887, 19 Q.B.D. 102.

[4] The indictment must specify the particular goods supplied within the four months (*H.M. Adv.* v. *M'Leods*, 1888, 16 R. (J.) 1; 2 White 71. In this case Lord M'Laren expressed the opinion that the prosecutor must aver that the false representation by means of which the goods were obtained was itself made within the four months prior to the sequestration.

appointed by the Sheriff, or to submit himself for examination in terms of the Bankruptcy Act.

"5. If, being insolvent,[1] and with intent to defraud his creditors or any of them, he makes or causes to be made any gift, delivery, or transfer of, or any charge on or affecting his property.

"6. If he fails without reasonable excuse to deliver or lodge in process in obedience to any order lawfully served upon him a state of his affairs subscribed by him, giving the particulars specified in the said order."

444. An important distinction between the group of offences under (A) and the group of offences under (B) is that in the former group intent to defraud enters into the definition of the offences, whereas in the latter it does not. In the former class of case it is apparently open to the accused to shew that he had, in fact, no intent to defraud. In the first instance it is enough for the prosecutor to prove the actual acts done by the accused in terms of the statute; he need not libel or specifically prove intent to defraud.[2] In the latter class of case it is enough to obtain a conviction for the prosecutor to prove that the accused has done the prohibited acts.[3]

445. The Act also provides (s. 182), that, where an undischarged bankrupt [4] obtains credit to the extent of £10 or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a crime and offence, and may be dealt with and punished as if he had been guilty of a crime and offence under s. 178 (B).[5]

446. The Act also provides (s. 179): "If any creditor under any petition for sequestration wilfully, and with intent to defraud, makes any false claim, or makes or tenders any proof, affidavit, declaration, or statement of account which is untrue in any material particular, he shall be deemed guilty of a crime and offence under s. 178 (B)."

447. The crimes and offences set forth in the preceding paragraphs may be tried before the High Court, or before the Sheriff and a jury, or before the Sheriff summarily.[6] The prosecution in such cases may be either at the instance of the Lord Advocate or of the trustee in the sequestration with the concurrence of the Lord Advocate.[7] On conviction before the High Court of Justiciary or before the Sheriff and a jury the debtor is liable to imprisonment not exceeding two years. On conviction by the Sheriff summarily, he may be imprisoned for any period not exceeding six months, with or without hard labour.[6] Besides

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[1] *Robertsons* v. *Caird*, 1885, 13 R. (J.) 1; 5 Coup. 664.

[2] *Howman* v. *Mackie*, 1891, 18 R. (J.) 30; 2 White 617; *Taylor* v. *H.M. Adv.*, 1897, 24 R. (J.) 65; 2 Adam 296; see also *Small* v. *Hart*, 1886, 13 R. (J.) 45; 1 White 80.

[3] Goudy on Bankruptcy, p. 612.

[4] Defined in s. 2 of the Act.

[5] *H.M. Adv.* v. *Livingstone*, 1888, 15 R. (J.) 48; 1 White 587.

[6] Sec. 178.

[7] Sec. 186.

the awarded punishment he forfeits all rights to his estate.[1] Where any person is liable under any other Act of Parliament or at common law to any punishment or penalty for any offence made punishable by this Act, such person may be proceeded against under such other Act of Parliament or at common law or under this Act, so that he be not punished twice for the same offence.[2]

PART III.—CRIMINAL ADMINISTRATION.

Section 1.—Introduction.

448. There are three features in the administration of the criminal law in Scotland that stamp it with its distinctive character : (1) Prosecutions for offences are almost entirely at the instance of a public prosecutor, private prosecution being very rare except in some minor statutory offences.[3] (2) Preliminary inquiries into a criminal charge are made confidentially, the evidence on which an accused person is charged being, with few exceptions, made public for the first time at the trial. (3) The investigation into the circumstances of a sudden or suspicious death is as a rule made privately and confidentially, the evidence not becoming public unless criminal proceedings follow, or a public inquiry is ordered under statute.[4] A coroner's inquest is unknown in Scotland.

At the head of the criminal administration is the Lord Advocate, and under him are the Solicitor-General for Scotland, the Advocates-Depute, the Crown Agent, and the Sheriff's Procurators-Fiscal. The method of administration is conveniently explained by an account of the powers and duties of these officials.

Section 2.—Law Officers.

Subsection (1).—*The Lord Advocate.*

(i) *General.*

449. The Lord Advocate is the principal law officer of the Crown. The early history of the office is obscure, but it is plain that it grew out of the necessity for the King having an advocate to represent him in proceedings both criminal and civil. Hence the original title was "King's Advocate" or "King's Majesty's Advocate"[5]—a similar title being still in use in modern indictments which are at the instance of "His Majesty's Advocate."[6] The title of Lord Advocate is found

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[1] Sec. 186.

[2] Sec. 181 ; contrast *Blair* v. *North British and Mercantile Insurance Co.*, 1888, 16 R. 325, per Lord Pres. Inglis.

[3] For advantages of this system see Hume, Com. i., Introduction, 9 ; Alison, ii. 83.

[4] Fatal Accidents Inquiry (Scotland) Act, 1895 (58 & 59 Vict. c. 36), and Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act, 1906 (6 Edw. VII. c. 35).

[5] See, *e.g.*, Act, James VI., 1579, c. 78.

[6] Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35), Sched. A.

for the first time in the record of the trial of Arnot of Woodmiln, 3rd November 1598.[1] In the fifteenth and sixteenth centuries the function of the King's Advocate was in the main to conduct the prosecution at the trial, the preparation of the indictment and other preliminaries being in the hands of the Justice-Clerk. At the trial the King's Advocate was master of the proceedings, which he could abandon or press to an issue as he thought fit.[2] Since 1537 the Lord Advocate has by statute had the right to sit within the bar,[3] and in 1587 his position as public prosecutor was consolidated by statute,[4] though it is a mistake to suppose that his privileges were first conferred by that Act.[5] Thus before the end of the sixteenth century the office was, and has since remained, one of paramount importance in criminal administration. The Lord Advocate is one of the great officers of state in Scotland. Before the Union of the Crowns he had, *ex officio*, a seat in Parliament, and since the Union it has been customary for him to be a member of the House of Commons. He is a member of the Ministry, and goes out of office with them. In Parliament he has, with the Secretary of State for Scotland, charge of Scottish affairs.

(ii) *Powers and Duties.*

450. The Lord Advocate has full power to prosecute all crimes committed in Scotland. He is "the public accuser, who insists in the name of the King, and for His Majesty's interest in the execution of his laws, and in the tranquillity and welfare of his people." [6] In crimes of a public nature, such as treason, sedition, blasphemy, riot and incest, he alone has the right to prosecute.[7] In other crimes the party injured has a right to prosecute,[8] though the right has for long been very rarely exercised.[9] The Lord Advocate, by himself or his deputes, is the only competent public prosecutor in the High Court,[10] and is entitled to prosecute in any Court whether supreme or inferior.[11] The Solicitor-General and Advocates-Depute prosecute as his deputies. The Lord Advocate has complete discretion in the prosecution of crimes and cannot be compelled to prosecute at his own instance,[12] even by the High Court of Justiciary.[13] When proceedings have been instituted he is complete master of the case, and may, even after the verdict has been pronounced, restrict the pains of law or abandon any charge in whole or in part.[14] He is not entitled to suggest the punishment, the sentence

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[1] M'Laurin, Introduction, 34; Hume, ii. 131.
[2] Hume, *ibid.*; Alison, ii. 85.
[3] Act 1537, c. 67; Mackay, Manual, p. 30, note (*d*).
[4] Act 1587, c. 77.
[5] Hume, ii. 130; Alison, ii. 84. See Omond, History of Lords Advocate; Mackay, Pract. i. 119, note (*b*).
[6] Hume, ii. 130.
[7] Hume, ii. 132.
[8] See Concourse of Public Prosecutor, para. 471, *infra*.
[9] Alison, ii. 88; *J. & P. Coats, Ltd.* v. *Brown*, 1909, 6 Adam 19; 1909 S.C. (J.) 29.
[10] Hume, ii. 131.
[11] Alison, ii. 86.
[12] Alison, ii. 87.
[13] *Gordon* v. *H.M. Adv.*, 1766, M'Laurin 258; Hume, ii. 134.
[14] Hume, *ibid.*; Alison, ii. 88.

being entirely in the hands of the Court.[1] Sentence cannot be pronounced except on the motion of the prosecutor.[1] The Lord Advocate is not required to find caution, or to take the oath of calumny, and is not liable in expenses or penalties in the event of an acquittal, as a private prosecutor may be.[2] He may delegate his powers to any number of deputes who are invested in criminal matters with all his powers.[3]

451. The Lord Advocate on his resignation continues in office until his successor receives his appointment, and all indictments raised by him continue in force and may be taken up by his successor.[4] If he dies, or is otherwise removed from office, accused persons may be indicted in the name of the Solicitor-General.[5] These provisions apply to indictments both in the High Court and in the Sheriff Court, in which indictments are now in the name of the Lord Advocate.[6]

452. In any case of sudden or suspicious death in Scotland, the Lord Advocate may, when it appears to him expedient in the public interest, direct that a public inquiry into such death and the circumstances thereof shall be held.[7] In practice such inquiries are ordered in cases in which the ordinary private inquiry by the Procurator-Fiscal has not sufficed to disclose the whole facts, or to allay legitimate public anxiety. A public inquiry is inappropriate in cases in which the facts warrant criminal proceedings, though occasionally facts may emerge at the inquiry which necessitate a subsequent prosecution.

Subsection (2).—*The Solicitor-General.*

453. The Solicitor-General is one of the law officers in Scotland, ranking next to the Lord Advocate. He is the first of the Lord Advocate's deputes, and is by his commission vested with all the powers of the Lord Advocate in criminal matters. He has no right to prosecute *jure officii*,[8] but since 1887 if the Lord Advocate die or be removed from office indictments may be at the instance of the Solicitor-General till a successor to the Lord Advocate is appointed. He does not demit office on the resignation of the Lord Advocate, but continues in office till his successor receives his appointment.[9] Since 1662 it has been a privilege of the Solicitor-General to plead within the bar,[10] and on presenting his commission he is invited by the Court to take his seat within the bar. He is a member of the Ministry and goes out of office with them.

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[1] Alison, ii. 90.
[2] Hume, ii. 134; Alison, ii. 92.
[3] Alison, ii. 86. See Solicitor-General and Advocates-Depute, paras. 453 and 454, *infra*.
[4] 50 & 51 Vict. c. 35, s. 3; Alison, ii. 96; *Halliday* v. *Wilson*, 1891, 3 White 38; 19 R. (J.) 3.
[5] 50 & 51 Vict. c. 35, s. 3; *Solicitor-General* v. *Lavelle*, 1913, 7 Adam 255; 1914 S.C. (J.) 15.
[6] 50 & 51 Vict. c. 35, s. 2.
[7] 6 Edw. VII. c. 36, s. 3.
[8] 5 Bro. Supp. 602; Hume, ii. 131.
[9] 50 & 51 Vict. c. 35, s. 3.
[10] Mackay, Manual, p. 30, note (*d*); 5 Bro. Supp. 603.

SUBSECTION (3).—*Advocates-Depute.*

(i) *General.*

454. An Advocate-Depute is a deputy appointed by the Lord Advocate to assist in the discharge of his duties. The first recorded appointment of an Advocate-Depute was in 1582.[1] There are now, in addition to the Solicitor-General, four Advocates-Depute, the senior of whom acts on the Home Circuit, the remaining three acting in turn for periods of six months on the North, South and West Circuits. There are also an Extra Advocate-Depute, who conducts the prosecutions in the second Court at Circuit Courts in Glasgow, and a Sheriff Court Depute, who is instructed for the prosecution in Sheriff Court cases in which the Lord Advocate considers the presence of counsel desirable. The appointment of his deputes is personal to the Lord Advocate, from whom, and not from the Crown, they hold their commissions. Their commissions are revocable at the pleasure of the Lord Advocate, who is responsible for their actions as for his own.[2] Prior to 1887 the Advocates-Depute went out of office with the Lord Advocate, but now, in virtue of the Criminal Procedure Act of that year, they continue in office on his resignation till their successors receive their appointments.[3] Before 1887, on the resignation of the Lord Advocate, and before his successor had appointed Advocates-Depute, the Court appointed a member of the bar as Advocate-Depute for the Court then sitting,[4] and the same course is still competent if the Advocate-Depute is absent owing to illness or other cause.[5]

(ii) *Powers and Duties.*

455. Advocates-Depute conduct the prosecution in all criminal trials in the Circuit Courts of Justiciary. In prosecutions in the High Court at Edinburgh the Lord Advocate or the Solicitor-General usually appears personally, but in their absence the prosecution is conducted by the Advocate-Depute on the Home Circuit. In the conduct of prosecutions the Advocate-Depute is vested by his commission with all the powers which the Lord Advocate would have if present.

456. Breaches of the criminal law are investigated by the Procurator-Fiscal of the district in which they occur, and, unless of a trivial nature, are reported by him to the Crown Agent for the instructions of Crown Counsel. The Crown Agent submits the papers to the Advocate-Depute in whose Circuit the case has occurred, who, after such further inquiry as he thinks necessary, decides whether or not there is to be a prosecution, and if he orders one, whether it shall be before the High Court, the Sheriff and a jury, or the Sheriff summarily. In matters of difficulty and importance, the Advocates-Depute take the instructions of the Lord Advocate before coming to a decision. In all cases of sudden, suspicious,

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[1] Hume, ii. 132. [2] Alison, ii. 86. [3] 50 & 51 Vict. c. 35, s. 3.
[4] *H.M. Adv.* v. *Campbell*, 1868, 1 Coup. 182; *H.M. Adv.*, 1880, 4 Coup. 325; *H.M. Adv.*, 1880, 4 Coup. 326. [5] Hume, ii. 132; Macdonald, p. 285.

or accidental deaths private inquiry is made by the local Procurator-Fiscal, who reports to the Crown Agent. The Advocate-Depute, after such further investigation as may be required, either himself comes to a finding as to the cause of death for transmission to the local Registrar of Births, Deaths and Marriages, or instructs such proceedings, either criminal or by way of a public inquiry,[1] as are appropriate. All fires are similarly reported, and the Advocate-Depute decides whether there are grounds for criminal proceedings.

Section 3.—Crown Agent.

457. The Crown Agent is the solicitor to the Lord Advocate's Department, and has charge of the Crown Office, Edinburgh, the headquarters of criminal administration. Correspondence between the Lord Advocate and his deputes on the one hand, and the Procurators-Fiscal on the other, is carried on through the Crown Agent. The arrangements for the holding of sittings of the High Court of Justiciary are made between the Crown Office and the Justiciary Office. All general orders and circulars prepared by the Lord Advocate for the instruction of Crown Counsel, Procurators-Fiscal, Sheriff-Clerks, or other public officials are issued from the Crown Office. The office is also utilised for the collection of particulars required for parliamentary returns, and for obtaining information for the Lord Advocate on matters of parliamentary interpellation or departmental inquiry. The Crown Agent also acts as agent in all judicial proceedings, civil or criminal, in which the Lord Advocate appears as representing his own department. The Crown Agent is appointed by and holds office during the pleasure of the Lord Advocate. Accordingly, he goes out of office with the Lord Advocate. According to the ordinary routine of criminal work, which is the most important part of the work of the Crown Office, the Procurator-Fiscal reports all serious offences, accidents, fires, or sudden deaths to the Crown Agent. The latter lays the report before Crown Counsel, who return it to him with their instructions marked thereon. These instructions are then transmitted by the Crown Agent to the Procurator-Fiscal. At all trials in Circuit Courts of Justiciary the local Procurator-Fiscal acts as agent at the trial, but at trials in the High Court at Edinburgh the Crown Agent attends in that capacity, the Procurator-Fiscal being also present. The Crown Agent is *ex officio* one of the Prison Commissioners for Scotland.[2]

Section 4.—Procurator-Fiscal.

Subsection (1).—*Sheriff Court.*

(i) *General.*

458. The Procurators-Fiscal form the base on which the pyramid of criminal administration is built. They are, in their own districts, the

[1] Viz., under 58 & 59 Vict. c. 36, or 6 Edw. VII. c. 35.
[2] Prisons (Scotland) Act, 1877 (40 & 41 Vict. c. 53), s. 7.

chief executive officers in criminal matters of the Lord Advocate and the Sheriffs. It is on their investigations that criminal charges are made. They also conduct the prosecutions in the Sheriff Courts on indictment and summary complaint, and make inquiry in all sudden, suspicious and accidental deaths. They also collect for Exchequer the fines, forfeitures and penalties imposed in proceedings instituted by them. They discharge these duties under the supervision and direction of the Lord Advocate and the Sheriff, an arrangement which, though theoretically anomalous, works admirably in practice.

(ii) *History.*

459. The office is ancient and originated in the times when the Sheriff was both judge and prosecutor in his own Court. Gradually the practice arose of the Sheriff delegating to an officer the duty of prosecuting [1] and of collecting the fines and forfeitures imposed, in which in those days the Sheriff had a personal interest. By the seventeenth century the Procurator-Fiscal was recognised as a public prosecutor in the Sheriff Court,[2] and the Act 1701, c. 6, recognises the Lord Advocate and Procurator-Fiscal as the officials responsible for criminal procedure. The Procurator-Fiscal was still an official of the Sheriff alone, and his authority rested on the theory that he was the medium through which the Sheriff exercised his criminal jurisdiction. But this position was gradually changed and he became more and more an officer of the Lord Advocate. In 1746 all heritable jurisdictions in Scotland were abolished,[3] and fines and forfeitures which formerly fell to the Sheriff were required to be paid into Exchequer.[4] The Procurator-Fiscal's duties were thus extended to prosecuting the offences previously tried before the heritable jurisdictions, and he was brought into communication with the Crown in accounting to Exchequer for the fines imposed in his district. When in the nineteenth century the old practice of the Sheriff taking the precognitions in criminal cases ceased, the Procurator-Fiscal was brought further into touch with the Crown authorities. It is now he who takes such precognitions and in all cases of importance and difficulty reports the case to the Crown Agent for the instructions of Crown Counsel. He is thus brought directly under the Lord Advocate and acts in criminal matters under his directions.

(iii) *Appointment and Qualifications.*

460. Since 1907 the Procurator-Fiscal has been appointed by the Lord Advocate.[5] Previously he was appointed by the Sheriff. He cannot be removed from office except upon a report by the Lord President

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[1] *Rose* v. *Grant and Ors.*, 1853, 15 D. 908, per Lord Pres. M'Neill at p. 910.

[2] Sir George Mackenzie, Discourses upon the Laws and Customs of Scotland in Matters Criminal, part ii. tit. 19, No. 2.

[3] Heritable Jurisdictions Act, 1746 (20 Geo. II. c. 43), s. 1.

[4] *Ibid.*, s. 43.

[5] Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51), s. 22; Sheriff Courts and Legal Officers (Scotland) Act, 1927 (17 & 18 Geo. V. c. 35, s. 1 (2).

of the Court of Session and the Lord Justice-Clerk.[1] He is usually, but not necessarily, an enrolled law agent.[2] In most cases he is restricted from private practice as a law agent, though in some country districts he is permitted to practise. He is debarred from acting as a political agent, and from submitting himself for election or interfering in any way in elections to local authorities. The same rules apply to Depute Procurators-Fiscal.

(iv) *Depute Procurator-Fiscal.*

461. The Procurator-Fiscal may, with the consent of the Lord Advocate, appoint a depute or deputes to assist him in his work, for whose actings he is responsible.[3] In the event of a vacancy in the office of Procurator-Fiscal a depute has all the powers of a Procurator-Fiscal until the vacancy is filled.[4] The deputation may be recalled at the pleasure of the Lord Advocate or the Procurator-Fiscal. In the absence of the Procurator-Fiscal the Court has an inherent power to appoint a Procurator-Fiscal *pro hac vice*.[5] In the case of a vacancy in the office of Procurator-Fiscal or Procurator-Fiscal Depute, or in case of incapacity, the Lord Advocate may give directions for the discharge of his duties during the vacancy or incapacity by any other officer in the Procurator-Fiscal service or by any other fit person.[6]

(v) *Responsibility.*

462. The position of the Procurator-Fiscal, as of other public prosecutors, is highly privileged, and he is not liable in damages for his actions in the execution of his duties unless it be proved that he acted maliciously and without probable cause.[7] There is a strong presumption that he is doing his duty honestly and *in bona fide*.[8] But if he acts outwith his powers in such a manner as to make his action illegal his privilege is of no avail.[9] In summary prosecutions special privileges are afforded to Procurators-Fiscal by statute.[10] No prosecutor in such cases is liable in damages unless the person suing has suffered imprisonment and it is proved that the prosecutor acted maliciously and without probable cause.

(vi) *Duties.*

463. The Procurator-Fiscal is guided in his official duties by a Code of Regulations to be observed in criminal and other investigations, issued

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[1] 17 & 18 Geo. V. c. 35, s. 1 (3).

[2] *Ward and Ors.* v. *Young and Macminn*, 1847, Ark. 272.

[3] 17 & 18 Geo. V. c. 35, s. 9.

[4] 7 Edw. VII. c. 51, s. 24.

[5] *Macrae* v. *Cooper*, 1882, 4 Coup. 561; 9 R. (J.) 11; *Hill* v. *Finlayson*, 1883, 5 Coup. 284; 10 R. (J.) 66; *Walker* v. *Emslie*, 1899, 3 Adam 102; 2 F. (J.) 18.

[6] 17 & 18 Geo. V. c. 35, s. 4.

[7] *Bell* v. *Black & Morrison*, 1865, 3 M. 1026; *Urquhart* v. *Dick*, 1865, 3 M. 932; *Craig* v. *Peebles*, 1876, 3 R. 441; *Beaton* v. *Ivory*, 1887, 14 R. 1057; *M'Pherson* v. *M'Lennan*, 1887, 14 R. 1063; *Rae* v. *Strathern*, 1924 S.C. 147.

[8] *Beaton* v. *Ivory*, *supra*.

[9] *Bell* v. *Black & Morrison*, *supra*; *M'Crone* v. *Sawers*, 1835, 13 S. 443.

[10] Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. c. 65), s. 59; *Rae* v. *Strathern*, *supra*; *Graham* v. *Strathern*, 1924 S.C. 699.

from the Crown Office, and amended or added to from time to time by the Lord Advocate as circumstances require. No exhaustive account of his duties is here attempted, and the following paragraphs deal only with his more important functions. He must reside within his district, which he may not leave for more than a brief period without the sanction of the Sheriff, duly reported to the Crown Agent.

(a) *Public Prosecutor in Sheriff Court.*

464. The Procurator-Fiscal is the public prosecutor in the Sheriff Court both in cases tried on indictment and those tried summarily. Complaints under the Summary Jurisdiction Acts run in his name, and may be taken up and proceeded with by his successor.[1] His title to prosecute is inherent in his appointment and cannot be excluded except by statute either expressly or by necessary implication.[2] The Lord Advocate, after consultation with the Treasury, may by order direct that summary prosecutions under any Act shall, notwithstanding anything therein contained, be taken by and at the instance of the Procurator-Fiscal.[3] In important cases, whether tried on indictment or summarily, the Lord Advocate may order the prosecution to be conducted by the Advocate-Depute in the Sheriff Court.

(b) *Criminal Investigations.*

465. It is the duty of the Procurator-Fiscal to make inquiry into suspected offences in his district. His investigation should be prompt and exhaustive, including where necessary an inspection of the *locus*. In appropriate cases, such as injuries to the person or death from violence, he should immediately employ medical men to examine and report on the injured person or body. A post-mortem examination should, if necessary, be ordered. Where an injured person's life is in danger a dying deposition should be taken. In all cases in which he is credibly informed of the commission of a crime he should take immediate steps for apprehending the accused person. In making his investigation he may avail himself of the assistance of the police, but the duties should so far as possible be discharged by himself or his depute. In particular the important and delicate duty of taking precognitions from witnesses should always be carried out by the Procurator-Fiscal or his depute. If in doubt or difficulty, he should refer to the Crown Agent for the instructions of Crown Counsel. When the precognition is complete he reports to the Crown Agent, who submits the papers to the Advocate-Depute in whose Circuit the case arises for instructions as to further proceedings.

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[1] 17 & 18 Geo. V. c. 35, s. 20.

[2] *Nicholson* v. *Yoole*, 1885, 5 Coup. 628; 12 R. (J.) 46; *Rintoul* v. *Scottish Insurance Commrs.*, 1913, 7 Adam 210; 1913 S.C. (J). 120.

[3] 17 & 18 Geo. V. c. 35, s. 12.

(c) *Sudden, Suspicious and Accidental Deaths.*

466. There being no coroner's inquest in Scotland, the duties of the Coroner are performed by the Procurator-Fiscal acting under the instructions of Crown Counsel. In all cases of sudden, suspicious and accidental deaths the Procurator-Fiscal makes inquiry and reports to the Crown Agent for the instructions of Crown Counsel, who decide the further procedure.[1] According to the circumstances of the case Crown Counsel order no proceedings, or instruct the Procurator-Fiscal to bring a criminal charge, or order a public inquiry under the Fatal Accidents Inquiry (Scotland) Act, 1895, or the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act, 1906. In the case of all such deaths a schedule setting forth the cause of death is transmitted, after revisal by Crown Counsel, by the Procurator-Fiscal to the Registrar of Deaths.

(d) *Fires.*

467. The Procurator-Fiscal investigates the circumstances of all fires occurring in his district, and reports the result to the Crown Agent for instructions.

(e) *Exchequer Business.*

468. The Procurator-Fiscal represents the King's and Lord Treasurer's Remembrancer in matters affecting the interests of the Crown, as, for example, treasure-trove and estates falling to His Majesty as *ultimus hæres.*

Subsection (2).—*Justice of Peace Court.*

469. Under the Act 1661, c. 38, the Justices of the Peace at a meeting of Quarter Sessions appoint an official called the Fiscal of the Peace. His duties are to institute or concur in all proceedings for the prosecution of petty offences, or for the recovery of fines and penalties competent before the Justices of the Peace. He has also various duties under the licensing Acts. The appointment is not *ad vitam aut culpam*, but at the pleasure of the Justices.[2]

Subsection (3).—*Burgh Court.*

470. In burghs a Burgh Prosecutor is appointed under statute who has all the powers and privileges appertaining to any Procurator-Fiscal.[3] The Chief Constable of the burgh may be appointed to the office.[4] All prosecutions and proceedings in the Burgh Court are at his instance.[5] In the absence of the Burgh Prosecutor the magistrate may appoint a competent person to act in his stead and name.[6] Such appointment

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[1] See as to children, 8 Edw. VII. c. 87, ss. 6 and 132, and as to prisoners, 40 & 41 Vict. c. 53, s. 53. As to injury by explosions see Accident.

[2] *Rose* v. *Grant and Ors.*, 1853, 15 D. 908.

[3] Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), s. 461.

[4] *Ibid*, s. 78. [5] *Ibid.*, ss. 462 and 477. [6] *Ibid.*, s. 462.

must be in writing.[1] The right of the Sheriff's Procurator-Fiscal to prosecute within the burgh is reserved.[2]

Section 5.—Concourse of Public Prosecutor.

Subsection (1).—*Lord Advocate.*

471. The original form of prosecution in Scotland was at the instance of the private party injured, who prosecuted not only for his private interest but *ad vindictam publicam*.[3] Such prosecutions are still competent, but have been almost entirely superseded by prosecutions at the instance of the Lord Advocate.[4] That a crime has been condoned or discharged by the injured person does not preclude the prosecution of the criminal at the instance of a public prosecutor.[5] A private party cannot prosecute except with the concourse of the Lord Advocate.[6] Two reasons are given for this by Hume: His Majesty's interest firstly in fines and confiscations accruing on convictions, and secondly in the equal distribution of justice to all subjects, who are thus protected from malicious or vindictive prosecution by private individuals.[7]

472. The Lord Advocate is not bound to give his concurrence to a private prosecution, but if he refuses to do so the injured party may apply to the High Court, who may either sanction a private prosecution without the concourse of the Lord Advocate or ordain him to grant his concurrence.[8] The latter course would probably now be adopted.[9] The Court requires strong grounds for interfering with the Lord Advocate's discretion, as is shewn by there being only one reported case in which a private prosecution has been authorised when the Lord Advocate had refused his concourse.[9]

473. In certain cases of a quasi-criminal nature the concourse of the Lord Advocate is required, and if not obtained, the proceedings will be quashed as incompetent.[10] Such cases are petitions for breach of interdict with penal conclusions,[11] and complaints against inferior judges [12] or officers of Court [13] for malversation in office where punishment is concluded for. In actions of declarator of contravention of lawburrows the Lord

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[1] *Dunlop* v. *Sempill*, 1900, 3 Adam 159; 2 F. (J.) 46.
[2] 55 & 56 Vict. c. 55, s. 508.
[3] Hume, ii. 118; Alison, ii. 99.
[4] *J. & P. Coats, Ltd.* v. *Brown*, 1909, 6 Adam 19; 1909 S.C. (J.) 29.
[5] Trayner's Latin Maxims and Phrases, 4th ed., p. 33. *sub nom.* "*Ad vindictam publicam.*"
[6] Hume, ii. 125; Alison, ii. 111; *Mackintosh* v. *H.M. Adv.*, 1872, 2 Coup. 236 and 367; *Robertson* v. *H.M. Adv.*, 1887, 1 White 468; 15 R. (J.) 1; *Robertson* v. *H.M. Adv.*, 1892, 3 White 230.
[7] Hume, ii. 125; Alison, ii. 111.
[8] Hume, ii. 126; and authorities cited in notes 4 and 6, *supra*.
[9] *J. & P. Coats, Ltd.* v. *Brown*, *supra*.
[10] *Mackenzie* v. *Thomson*, 1843, 5 D. 771.
[11] *Duke of Northumberland* v. *Harris*, 1832, 10 S. 366; *Usher* v. *Mags. of Edinburgh*, 1839, 1 D. 639.
[12] *M'Aulay* v. *M'Kenzie*, 1830, 9 S. 48.
[13] *Syme* v. *Murray*, 19th January 1810, F.C.; *Harvey* v. *Swan*, 1837, 16 S. 249; but see *J. & W. Macfarlane* v. *A. B.*, 1827, 5 S. 537.

Advocate must be a joint pursuer.[1] It is no longer necessary to obtain the concurrence of the Lord Advocate to a summons of reduction improbation, or ranking and sale.[2] Proceedings for the revocation of a patent must be in the form of an action of reduction at the instance of the Lord Advocate, or at the instance of a party having interest, with his concurrence.[3]

SUBSECTION (2).—*Sheriff Court.*

474. The general principles above explained as governing the question of concourse by the Lord Advocate in the High Court of Justiciary apply to concourse by the Procurator-Fiscal or other public prosecutor in the inferior Courts. Prosecutions on indictment in the Sheriff Court can proceed only at the instance of the Lord Advocate, and consequently a private prosecution on indictment in that Court is incompetent even with the concourse of the Lord Advocate or Procurator-Fiscal.[4] In summary prosecutions at the instance of private prosecutors the concourse of the Procurator-Fiscal, or other prosecutor of the Court, is required, unless the right to prosecute is conferred on private individuals by statute.[5] Where an individual has no right to prosecute, the instance is not made good by the concourse of the Procurator-Fiscal.[6] Even in civil cases, if penal consequences are prayed for, the concourse of the Procurator-Fiscal is required.[7]

475. When the concurrence of the Procurator-Fiscal is required, it must be given before the warrant for service is granted. Otherwise the instance is defective and cannot be amended at a later stage.[8] Concourse is granted by the Procurator-Fiscal writing and signing a minute of concurrence on the face of the complaint. The Procurator-Fiscal is not liable in damages in respect of giving his concurrence, unless malice is averred and proved.[9]

SECTION 6.—PRECOGNITION.

476. After a suspected person has been apprehended and brought before a magistrate, the next step is to make inquiry into the grounds of suspicion against him. The inquiry, called a precognition, is made by taking the declarations of such persons as have knowledge of the facts and circumstances of the case.[10] It was formerly conducted by the

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[1] Stair, i. 9, 30; *Robertson* v. *Ross*, 1873, 11 M. 910.

[2] 31 & 32 Vict. c. 100, s. 17; see *Colt* v. *Simpson*, 1610, Mor. 7897.

[3] 7 Edw. VII. c. 29, s. 94 (3).

[4] 50 & 51 Vict. c. 35, s. 2; *Dunbar* v. *Johnston*, 1904, 4 Adam 505; 7 F. (J.) 40.

[5] Hume, ii. 66; Summary Jurisdiction Act, 1908 (8 Edw. VII. c. 65), s. 18; Macdonald, p. 283, and authorities there cited; *Rintoul* v. *Scottish Insurance Commrs.*, 1913, 7 Adam 210; 1913 S.C. (J.) 120.

[6] *Simpson* v. *Board of Trade*, 1892, 3 White 167; 19 R. (J.) 66; *Duke of Bedford* v. *Kerr*, 1893, 3 White 493; 20 R. (J.) 65; *M'Douall* v. *Irvine*, 1908 S.C. 60.

[7] Dove Wilson, Sheriff Court Practice, pp. 442, 492.

[8] *Lundie* v. *M'Brayne*, 1894, 1 Adam 342; 21 R. (J.) 33.

[9] *Arbuckle*, 1815, 3 Dow 160.

[10] Hume, ii. 81.

Sheriffs, Justices of the Peace and other inferior judges, and in early days even by judges of the High Court.[1] It is now made by the Procurator-Fiscal, who appeals to the magistrate for assistance only if witnesses refuse to give all information in their possession. The magistrate may cite witnesses to attend for precognition, and if they prove contumacious may commit them to prison. He may put witnesses on oath provided they would be competent witnesses at the trial. Witnesses should not be examined in the presence of other witnesses, and the ordinary rules of evidence should be observed in conducting the examinations.[2] A person who may himself be charged should not be examined, and if examined on oath cannot afterwards be charged.[3] The declaration should be reduced to writing and signed by the witnesses.[4] The precognition when complete is reported by the Procurator-Fiscal to the Crown Agent for the instructions of Crown Counsel.

477. Opinions have differed as to the competency of contradicting a witness by what he has said in precognition, and the question cannot be said to be finally determined. Hume lays down a definite rule that no such use can be made of a precognition. "After being questioned *in initialibus*, and before giving his evidence in the case, the witness, if he please, may call for his declaration (or deposition if he has been sworn) and have it cancelled in his presence, that he may be at absolute freedom in telling his story on the trial. . . . But even if the declaration should not be cancelled, yet certainly it can never be employed, in any manner of way, to the prejudice of the witness; nor can it even be produced in the trial, to discredit his evidence, by shewing that he had given a different account on some former occasion." [5] Hume's rule has not been strictly followed, perhaps unfortunately, as in modern practice a precognition is less formal than when it was taken before a magistrate. It is, as Lord Dunedin said,[6] "not necessarily what the (witness) said, but merely the Procurator-Fiscal's (or his clerk's) version of what he said." Practice has on the whole favoured Hume's view,[7] but there have been exceptions both in criminal [8] and in civil cases.[9] In the most recent case in the Inner House the question was raised but left undecided.[10]

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[1] Hume, ii. 83; Alison, ii. 134.

[2] Macdonald, p. 286; Hume, ii. 82; Alison, ii. 137 *et seq.*; Dickson, Law of Evidence, 3rd ed., para. 1590 *et seq.*; *Duncan* v. *Thomson*, 1834, 12 S. 935; *Reid* v. *Duff*, 1843, 5 D. 656.

[3] Alison, ii. 138.

[4] Alison, ii. 142.

[5] Hume, ii. 381; see also Dickson, Law of Evidence, 3rd ed., para. 1591; Alison, ii. 504.

[6] *Sheridan* v. *Peel*, 1907 S.C. 577.

[7] Dickson, Law of Evidence, para. 265; *Emslie* v. *Alexander*, 1862, 1 M. 209, per Lord Justice-Clerk Inglis and Lord Neaves at p. 210; *O'Donnell M'Guire*, 1855, 2 Irv. 236; *Dysart Peerage Case*, 1881, 6 App. Cas. 489, per Lord Watson at p. 509; *The Lauderdale Peerage*, 1885, 10 App. Cas. 692, per Selborne L.C. at p. 710; *Binnie* v. *Black*, 1923, S.L.T. 98.

[8] *H.M. Adv.* v. *Robertson*, 1873, 2 Coup. 495; *H.M. Adv.* v. *Leckie*, 1895, 1 Adam 538.

[9] *Inch* v. *Inch*, 1856, 18 D. 997; *Shearer* v. *M'Laren*, 1922, S.L.T. 158.

[10] *Livingstone* v. *Strachan, Crerar & Jones*, 1923 S.C. 794, per Lord Justice-Clerk Alness at p. 802, and Lord Murray at p. 818.

478. It is incompetent to prove statements of a deceased person by his precognition.[1] Evidence of witnesses who can speak from their unaided recollection as to what deceased said on precognition has, however, been admitted.[2] Precognitions taken by Crown officials are privileged, and the Court will not as a rule order their production.[3] If, however, injustice would result from withholding such precognitions, and no objection is made by the Lord Advocate, the Court will order their production.[4]

Section 7.—Pardon.

479. A sentence pronounced by a criminal Court which has become final falls to be carried out, unless remitted in whole or in part by the Sovereign, who alone has the power to pardon.[5] Sentences were occasionally reversed by Act of Parliament,[6] but this method of review is now obsolete. In disposing of appeals for pardon from Scotland the Crown is advised by the Secretary of State for Scotland, who makes such inquiries into the circumstances of the case as he thinks proper, and considers any petitions in favour of the condemned person which are forwarded to him. A pardon may be absolute or conditional.[7] The most frequent instance of a conditional pardon is when a person condemned to death is pardoned on condition of being kept in penal servitude for life. A pardon is transmitted from the Secretary of State for Scotland, and is now filed in the Justiciary Office, a note of the pardon or remission being made on the margin of the record of the conviction in the High Court to which it applies. The fact of the pardon is also communicated to the Prison Commissioners, who give to it the appropriate effect as regards sentence.[8] The effect of a pardon is to remit the sentence imposed by the Court in whole or in part, but it does not affect any claims an injured person may have against the person pardoned.[9]

Section 8.—Letters of Slains.

480. This obsolete legal writ, which was in common use two centuries ago in connection with the administration of Scottish criminal law, derived its origin from the primitive conception of crime as an injury done to the individual rather than to the State. Before the infliction of punishment for the commission of crimes had come to be regarded as a public duty rather than a private right, and while criminal jurisdiction

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[1] Dickson, Law of Evidence, para. 271; *H.M. Adv.* v. *Wards*, 1869, 1 Coup. 186; *Kenny or Lynch*, 1866, 5 Irv. 300; *Stephens*, 1839, 2 Swin. 348.

[2] Macdonald, p. 480; *H.M. Adv.* v. *Wards, supra; Stephens, supra;* Dickson, Law of Evidence, para. 271. But see *Kenny or Lynch, supra.*

[3] Dickson, Law of Evidence, para. 1654, and cases there cited; *Sheridan* v. *Peel*, 1907 S.C. 577; *Arthur* v. *Lindsay*, 1895, 22 R. 417.

[4] Dickson, Law of Evidence, para. 1655, and cases there cited; *Mills* v. *Kelvin & James White, Ltd.*, 1912 S.C. 995.

[5] Macdonald, p. 552; Hume, ii. 495; Alison, ii. 677.

[6] Hume, ii. 504; Alison, ii. 677.

[7] Hume, ii. 500; Alison, ii. 679; Macdonald, p. 552.

[8] Act of Adjournal of 31st October 1907.

[9] Hume, ii. 496; Alison, ii. 678.

was still in its infancy, it was the custom for the kindred of a murdered man to institute a blood-feud or vendetta against the murderer, which was only expiated by the offender's blood. In course of time the practice arose of the murderer buying off the vengeance of his victim's representatives by making payment to them of a sum of money or other compensation, variously known as Cro, Wergild, or Eric. So inherent in the conception of the crime of homicide was this right on the part of the representatives of the murdered person to exact compensation, or, as it came to be termed, assythment, from the offender, that it continued to subsist concurrently with, and long after the institution of public prosecution. The kindred could not demand an assythment where the murderer suffered execution at the hands of the law, his blood being regarded as a full satisfaction to them, but where the criminal was not put to death they were held entitled to a compensation in lieu thereof. In particular the prerogative of pardon, vested in the King as the supreme representative of the public interest, could only be properly exercised by him subject to the rights in this respect of the deceased's kinsmen, and the criminal Courts would not admit any royal remission unless it safeguarded these rights. It accordingly became the practice for persons who had committed homicide, and who desired to secure an effectual pardon from the Crown which would be recognised by the Courts, first to approach the deceased's next-of-kin and obtain from them a writ stating that their claims had been satisfied. These writs were known as Letters of Slains. They narrated the circumstances of the murder, the remorse of the perpetrator, the payment of the assythment, the forgiveness of the crime and the exoneration of the offender from all civil and criminal action in relation to the murder, and they concluded with a prayer to the Crown to grant a full pardon and remission to the murderer, and to dispone to him his moveable escheat forfeited by the crime.

481. Letters of Slains were properly granted by the principal persons of the four branches of the deceased's next-of-kin, if known, or by the majority of his next-of-kin and friends, or by as many of them as were known, so that they might embrace all who could reasonably be regarded as injured by the deceased's death, or entitled to assythment therefor, and who in former times would have pursued a blood-feud against the murderer. Where Letters of Slains were not produced, the King could only grant remission on the prayer of the deceased's kinsfolk otherwise made to him, or subject to a proviso that their satisfaction should be a condition precedent to the pardon taking effect. Such royal remissions were appropriately granted only in cases of unintentional manslaughter, or of homicide without malice aforethought; but this principle was not strictly observed, and the royal prerogative of pardon was frequently abused. Although assythment was also due for other criminal wrongs short of homicide, Letters of Slains were only appropriate to the latter, and royal remissions of less serious crimes did not require such letters. A party who had obtained decree for an assythment was bound, before

executing his decree, to deliver, or at least tender, sufficient Letters of Slains to the offender, or, in the case of mutilation or other crimes less serious than murder, sufficient Letters of Reconciliation.[1]

PART IV.—CRIMINAL PROCEDURE (SOLEMN).

Section 1.—Introduction.

482. Closely allied with the subject of Criminal Administration is that of Criminal Procedure which forms the subject of this part. Indeed, the two subjects are so cognate that it is difficult at all points sharply to define the boundary line between them. For practical purposes, however, it may be taken that the sphere appropriate to Criminal Procedure begins at the point where, in proceedings in connection with the investigation and prosecution of crime, steps have to be taken by the investigating or prosecuting party *vis-à-vis* the person suspected or accused, which are of such a kind that any irregularity, omission, or neglect may be founded on by the latter as affecting the validity of the proceedings against him, or as entitling him to redress through the medium of the Courts and not merely by way of resort to administrative action through the department concerned. Criminal procedure in this sense of course includes the procedure applicable to the prosecution of crimes and offences of all degrees. But practically there is a broad distinction between the method of prosecution of the more trifling offences, which are dealt with by trial summarily either before a Sheriff or magistrate, on the one hand, and, on the other hand, the more deliberate method of procedure adopted for the trial of grave crimes and offences, which is known as "solemn." It is with the latter alone that this part is primarily concerned—the corresponding procedure applicable to summary trial being, in so far as it presents specialties, dealt with separately.[2]

483. The system which has for long prevailed in Scotland for the prosecution of crime is that of public prosecution—the enforcement of the criminal law being in the hands of the Lord Advocate, whose powers in this relation are of a very wide and comprehensive character. Private prosecution for crime is indeed competent, but only with the concurrence of the Lord Advocate; and this mode of procedure is exceedingly rare.[3] In this department of his office the Lord Advocate exercises directly the executive authority of the Sovereign, and he is not answer-

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[1] See Kames, Law Tracts, 2nd ed., article I., esp. 53-57; Essays on Anglo-Saxon Law, Boston, 1876, p. 262 *et seq.*; Bankt. i. 246-248; Balfour, Practicks, pp. 516-518; Hume, i. 284-286; ii. 122-124; Alison, i. 91; More's Stair, i. 9, 7 and lviii.; Ersk. iv. 4, 105; Bell's Prin., s. 2029; Statutes 1592, c. 157; 1593, c. 173. Dallas gives the form of Letters of Slains at p. 862, and of Royal Remissions at pp. 655-657 of his System of Stiles.

[2] See Part V., *infra*.

[3] *J. & P. Coats, Ltd.* v. *Brown*, 1909, 6 Adam 19; 1909 S.C. (J.) 29, and *infra*, paras. 564, 565.

able to, or bound to take instructions from, any other Minister of the Crown. An account of his powers in regard to the prosecution of crimes—of the staff associated with him in this—and of the departmental machinery by which his duties are carried out will be found above.[1]

484. At the present day criminal procedure is to a large extent defined and regulated by the provisions of various modern statutes. Of these, the principal is the Criminal Procedure (Scotland) Act, 1887,[2] in which is found the framework of the procedure now applicable to the solemn prosecution of all crimes except treason and rebellion. Any account of such procedure must therefore necessarily be largely an exposition of the provisions of that Act. But as the text of the Act is readily available to all practitioners, it has been thought proper where at all possible to state the import of its provisions without quoting sections *in extenso* or attempting to paraphrase them fully. As the Act does not apply to trials for treason or rebellion, the procedure in these is the subject of separate treatment elsewhere.

Section 2.—Apprehension of Criminal.

485. When a person—either through being caught red-handed, or upon the report of eye-witnesses, or as the result of inquiries made by the authorities as described under the heading of "Criminal Administration"—has fallen under such a suspicion of crime that the authorities deem it proper that proceedings should be taken against him with a view to having him brought to trial, the first step is normally to secure his apprehension. This may, according, to circumstances, be either with or without a warrant; and when with a warrant, the party suspected may be found to be either within or outwith the jurisdiction of the magistrate or judge issuing it, or indeed even outwith Scotland itself. In the latter case his apprehension may require to be effected in some other part of the British Isles, or in a British dominion or colony, or in a foreign country. The varying conditions governing these cases call for consideration. And further, it may be necessary to apprehend a suspected criminal in Scotland not for trial there, but with a view to his trial in the appropriate jurisdiction for some crime alleged to have been committed by him in some other part of the Empire, or in a foreign country.

Subsection (1).—*Apprehension without a Written Warrant.*

486. In sanctioning apprehension without a written warrant, the law carefully provides that, on the one hand, the liberty of the lieges shall not be endangered by indiscriminate arrest, and, on the other hand, the escape of criminals shall not be facilitated by too strict an adherence to form. At common law a police officer is entitled under special circum-

[1] See Part III., *supra*. [2] 50 & 51 Vict. c. 35.

stances to apprehend without a written warrant, it being always a question whether the circumstances justify the apprehension.[1] A police constable or other officer of the law, acting within the jurisdiction for which he is appointed,[2] may in the following cases apprehend without a written warrant: (1) where he sees a man committing or attempting to commit a high crime and offence (*e.g.* murder, murderous assault, robbery, serious theft, etc.), or finds a man under suspicious circumstances in possession of goods which the officer reasonably believes to be stolen, and for which the man cannot account in a manner consistent with his being innocent, and where, without such instantaneous exercise of authority, there is a probability of the criminal escaping;[3] (2) where he is informed by a credible eye-witness, or by an injured party, immediately after the occurrence, that a man has committed a high crime and offence, and there is a similar risk of his escape;[4] (3) where he sees a man committing a breach of the peace, or an outrage, or threatening immediate violence, and where, without instant restraint of the offender, there is danger of his doing injury to himself or others;[5] (4) where he sees a man committing a contravention of an Act of Parliament which, in such circumstances, authorises a constable or other person to apprehend the offender without a written warrant; and (5) where a general or local Police Act confers authority to take offenders into custody without a written warrant.

487. Powers of arrest otherwise competent to a constable are not superseded by special statutory provisions authorising Justices to grant warrants on information on oath to summon offenders for breach of a statute.[6] But on the other hand a Police Act defining the duties of constables gives them no power beyond what they have at common law save in so far as the statute expressly provides.[1] Under an Act authorising arrest upon reasonable grounds of suspicion, it is for the arresting constable to satisfy a jury that he had such reasonable grounds.[7] Apprehension of criminals is now usually left to police officers. But a constable endeavouring to make an arrest, at least for serious crime, may summon bystanders to help him.[8] A magistrate (including any of the higher judges) who witnesses a crime may arrest the offender. And if immediate complaint be made to him by others who know the fact and who the offender is, he may verbally order arrest.[9] So, too, any citizen witnessing a felony may arrest the criminal, but he may not do so on suspicion or information. He may try to stop it, mere

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[1] *Peggie* v. *Clark*, 1868, 7 M. 89; *Shields* v. *Shearer and Anr.*, 1913 S.C. 1012; 1914 S.C. (H.L.) 33.

[2] *Leask* v. *Burt*, 1893, 21 R. 32.

[3] Hume, ii. 75, 76; Alison, ii. 117; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 28.

[4] *Ibid.*; see also *Jackson* v. *Stevenson*, 1897, 2 Adam 255; 24 R. (J.) 38.

[5] Hume, ii. 76; *M'Vie and Linch* v. *Dykes*, 1856, 2 Irv. 429.

[6] *M'Vie and Linch* v. *Dykes*, *supra*.

[7] *Shields* v. *Shearer*, *supra*, 1914 S.C. (H.L.) at p. 37

[8] Hume, ii. 75; Alison, ii. 115, 116; Macdonald, p. 259, note 4.

[9] Hume, ii. 75; Alison, ii. 116, 117. See *Beaton* v. *Ivory*, 1887, 14 R. 1057.

breach of the peace, but is not entitled to arrest. In some cases, however, power is conferred by statute on certain persons to arrest offenders taken in the act, and in a few instances power is given to any person to arrest.[1] If the person accused have taken refuge in a house, a constable in pursuit of him will inform the inmates of his office and of the charge against the accused, and demand admittance. If this be refused, he may then force the door.[2] A private citizen who pursues a criminal is not entitled to break open doors; he can only watch the house until a constable arrives.[3] Apprehension without a written warrant is but a temporary detention in custody. A formal warrant ought invariably to be obtained prior to examination and commitment for trial.[4]

488. By s. 27 of the Criminal Justice Administration Act, 1914,[5] it is provided that where at common law or under any Act whether passed before or after the commencement of that Act there is power to arrest a person without written warrant, a warrant for his arrest may be issued.

Subsection (2).—*Apprehension on Written Warrant.*

489. Except under the circumstances detailed in the last subsection a person suspected of crime may be apprehended only on a warrant granted by a magistrate (including as magistrates the higher judges); and as already pointed out, even when the exigencies of a case justify and have required actual apprehension without a written warrant, if it is desired to detain the person apprehended for examination and inquiry with a view to trial for a crime too serious to be dealt with summarily, it is proper that such a warrant should be obtained at the earliest possible moment to apprehend and bring him before a magistrate for examination and commitment. When a man is charged with a crime of this character the prosecutor applies for such a warrant. In the older practice, judicial examination was the first object attained by arrest; but the emitting of a declaration is now left to the option of the prisoner,[6] so that the principal object in such cases is now commitment for trial.

490. Any magistrate may, in virtue of his commission for conservation of the peace, grant warrant for examination and commitment within the territory of his jurisdiction [7] of a person charged with any crime, even though it be one of a degree of which he has not cognisance to the effect of trial and punishment. And even a baron-baillie had power to grant warrant to apprehend and detain until information as to the charge could be communicated to a higher magistrate.[8] In view

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[1] For some of these see Macdonald, p. 260, note 3.

[2] Hume, ii. 76.

[3] Macdonald, p. 260.

[4] *Jameson* v. *Pilmer*, 1849, J. Shaw 238; *M'Vie and Linch* v. *Dykes*, 1856, 2 Irv. 429; *Stevenson* v. *Watson*, 1857, 2 Irv. 592.

[5] 4 & 5 Geo. V. c. 58.

[6] 8 Edw. VII. c. 65, s. 77 (1).

[7] See para. 553, *infra*.

[8] Hume, ii. 77, on 20 Geo. II. c. 43; and see the case of *Hay*, 1824, S. (Just.) 113, in note to p. 77; Alison, ii. 120.

of the number and accessibility of higher magistrates in these days, this privilege is now probably rather of archaic than of practical interest. Unless prescribed by Act of Parliament authorising the proceedings,[1] it is unnecessary to accompany the request for a warrant with an oath or declaration, although the magistrate may require this. In practice, however, it is customary and proper to present a petition or information. The public prosecutor does not emit a preliminary oath; and need not do so even where the proceedings are founded upon an Act which prescribes one, if it contains a clause giving power to the public prosecutor to prosecute without prescribing that he must give information upon oath.[2] But where a statute prescribed an oath of verity as the initial step in criminal proceedings the fact that such oath had not been administered and taken was held to vitiate subsequent proceedings.[3]

491. In framing the petition or information the charge may be set forth as in Schedule A annexed to the Criminal Procedure (Scotland) Act, 1887.[4] The following is the form of such a petition: —

[Inverness], 18*th December* 1909.

Unto the Honourable the Sheriff of [Inverness-shire],

The Petition of , Procurator-Fiscal of [Inverness-shire] for the public interest;

Humbly sheweth,—

That, from information which the petitioner has received against [A. B., labourer, 238 High Street, Inverness], it appears that [on Tuesday, 14th December 1909], in [the shop 68 High Street, Inverness, occupied by C. S., draper], he did [steal a shawl]; [and he has been previously convicted of dishonest appropriation of property].

May it therefore please your Lordship to grant warrant to officers of Court and assistants to search for and apprehend the said A. B., in order to his being brought before you for examination; also to grant warrant to cite witnesses to be precognosced in the premises; and thereafter to do in the case as to your Lordship shall seem meet.

According to Justice, &c.,

(*Signed*) , P.-F.

Upon this petition a warrant is written. It contains six important parts—(*a*) place of signing; (*b*) date of signing; (*c*) style, quality, and county of magistrate, *e.g.* Sheriff-Substitute of ; (*d*) as full identification as is at the moment possible of the person meant to be apprehended, by name and designation or other description; (*e*) specification of the crime with which the accused is charged, or (in an

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[1] *Blythe & Taylor* v. *Robson*, 1853, 1 Irv. 235.

[2] *M'Leod* v. *Buchanan*, 1835, 13 S. 1153; *Crawford* v. *Wilson and Ors.*, 1838, 2 Swin. 200.

[3] 2 & 3 Will. IV. c. 65, s. 11; 25 & 26 Vict. c. 114, s. 3; Statute Law Revision Act, 1891 (54 & 55 Vict. c. 67), s. 1; *Trainer* v. *Johnston*, 1863, 4 Irv. 264; *Logan* v. *Coupland*, 1864, 4 Irv. 53; *Morris and Anr.* v. *Earl of Glasgow*, 1867, 5 Irv. 529; *Murray* v. *Allan and Ors.*, 1872, 11 M. 147; *Macdonald* v. *Milne*, 1897, 2 Adam 457.

[4] 50 & 51 Vict. c. 35, s. 16.

emergency) a general statement that he is to answer to such crime as shall be laid to his charge; and (*f*) signature of magistrate.[1]

492. As indicated above, the warrant should be dated and contain the other particulars specified. But most of these particulars are in practice supplied by the reference to the petition upon which the warrant is written. A warrant issued on an undated petition has been held valid, the relative oath and the warrant being dated.[2] If the petition and oath had no date this circumstance would vitiate the warrant.[3] Subject to these observations, the only indispensable requisite in the warrant itself, other than a reasonably accurate designation identifying the persons to be arrested, is the magistrate's signature.[4] The signature of one Justice of the Peace to a warrant is sufficient, unless two signatures are required by statute.[5] The warrant may be addressed generally to officers of Court, or to a named officer, or even to a private citizen.[5] The name of the person to be apprehended, if unknown, will be omitted, but the warrant must contain expressly or by reference to the petition "some clue, however slight," sufficient to distinguish him from all others.[6] It is illegal to issue a general warrant to apprehend all persons suspected of a certain crime or to order a general search for stolen goods.[7] The warrant may ordain the officer executing it to bring the offender before the granter of the warrant or before any other magistrate of the bounds. The following is the usual form of warrant:—

[Inverness], 18*th December* 1909.

[The Sheriff-Substitute] having considered the foregoing petition, grants warrant to search for and apprehend the said A. B., and bring him for examination; [and also to cite witnesses, as craved].

(*Signed*)

Section 3.—Procedure at Apprehension.

493. Apprehension is carried out very similarly whether the officer has a written warrant or not. If a warrant has been granted the officer must have it in his possession.[8] But it seems competent to detain temporarily the party wanted until the warrant arrives in any case where, without detention, it seems likely that he will abscond: at least if apprehension is ultimately made on a regular warrant, the prior detention will not vitiate the proceedings.[9] If the accused person should have taken refuge in a house, a constable holding the warrant going in pursuit of him will proceed as already explained in the case of an arrest without warrant so far as informing the inmates of the house of his office and the

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[1] Hume, ii. 78; Alison, ii. 122, 123.
[2] *Crawford* v. *Wilson and Ors.*, 1838, 2 Swin. 200.
[3] *M'Leod* v. *Buchanan*, 1835, 13 S. 1153.
[4] Hume, ii. 78; Alison, ii. 123.
[5] Hume, ii. 78; Alison, ii. 123; Macdonald, p. 261; *M'Creadie*, 1862, 4 Irv. 176.
[6] Alison, ii. 123.
[7] Hume, ii. 78.
[8] Hume, ii. 80.
[9] *M'Hattie* v. *Outram*, 1892, 3 White 289; *M'Hattie* v. *Wyness*, 19 R. (J.) 95; *Orr* v. *Deans*, 1902, 3 Adam 645; 4 F. (J.) 90.

charge against the accused, but he should also exhibit his warrant in demanding admission prior to forcing the door, which he may do if refused admittance.[1] An officer arresting with or without warrant must take care that the place of apprehension is within the bounds in which he acts; [2] and where the arrest is made under circumstances which require a warrant he should also be careful that the place is within the bounds for which the warrant runs. The area of validity of warrant and the mode of execution outside the bounds for which it primarily runs are dealt with below.[3]

494. In effecting an arrest, the officer briefly acquaints the prisoner with the charge against him and, if there is a warrant, with the substance of the warrant. He will shew the warrant if asked, but must not part with it.[4] Unless specially required by the particular Act of Parliament founded upon, it is not necessary to deliver to the accused a copy of the petition or complaint or warrant upon which he is being arrested.[5] The officer should, however, always state the substance of his warrant, and if asked to do so should shew it, especially if only acting as an officer *pro hac vice* or beyond his ordinary bounds. He should not break open doors without first having asked and been refused admission. On a charge of a criminal character it is competent to effect apprehension on a Sunday.[6] After reading or stating the charge, the officer cautions the accused that he need not say anything with reference to it, and that, if he does, it will be written down and may be used as evidence against him. Prolonged interrogation by police officers is objectionable. But any voluntary statement made by the accused is admissible as evidence and, when made, should be noted in writing at the time.[7]

495. In cases of minor crime a warrant to apprehend is not enforced in every case by actual apprehension of the person accused. Where the accused person is normally law-abiding with a domicile within the jurisdiction of the Court, a copy of the warrant may be, and frequently is, given to him with the information either verbally or by written notice of the time and place appointed for his examination with a view to commitment, accompanied by a warning that if he does not there and then attend he will be apprehended under the warrant. If the person so warned attends he is brought up for examination and, when desired, for commitment; while if he fails to appear he is apprehended and brought before the magistrate in the usual way. But if there should be anything in the circumstances likely to

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[1] Hume, ii. 76.
[2] Hume, ii. 78; *Leask* v. *Burt*, 1893, 21 R. 32.
[3] See *infra*, Backing a Warrant, para. 496 *et seq.*
[4] Hume, ii. 79.
[5] *Ayton* v. *Haig*, 1836, 1 Swin. 78; *Bisset* v. *Mackay*, 1855, 2 Irv. 68.
[6] See *Maitland* v. *Douglas*, 1861, 24 D. 193.
[7] *Smith* v. *Lamb*, 1888, 1 White 600; 15 R. (J.) 54; *H.M. Advocate* v. *Laing*, 1871, 2 Coup. 23; *Gracie* v. *Stuart*, 1884, 5 Coup. 379; 11 R. (J.) 22; *Waddell* v. *Kinnaird*, 1922, J.C. 40; *Hodgson* v. *Macpherson*, 1913 S.C. (J.) 68; 7 Adam 118; *Costello* v. *Macpherson*, 1922, J.C. 9; *H.M. Advocate* v. *Duff*, 1910, 6 Adam 248; *H.M. Advocate* v. *Simpson*, 1889, 2 White 298.

cause any prejudice to the party accused, such a course would be inadvisable.[1]

Section 4.—Backing a Warrant.

Subsection (1).—*Definition.*

496. If an officer has to make an arrest beyond the bounds for which the warrant held by him runs, it must in general be endorsed by a magistrate of the bounds within which it is proposed to make the arrest. "Backing" of the warrant is the term applied to this endorsation of it by a magistrate of competent jurisdiction for the purpose of authorising the execution of it in a territory beyond the bounds for which it was issued. Unless a warrant is thus backed it has no legal effect outside the bounds of the jurisdiction of the magistrate issuing it,[2] save in exceptional cases. The principal rules defining the cases in which a warrant is operative with or without backing respectively are the following:—

Subsection (2).—*Within Scotland.*

497. A warrant of the High Court of Justiciary runs throughout Scotland without backing.[3] A criminal warrant granted by a Sheriff against a person charged with having committed a crime within his jurisdiction is sufficient for the apprehension of the accused at any place within Scotland, and for conveying and disposing of the accused in terms of the warrant, without the necessity of backing or endorsation, if executed either by a messenger-at-arms or by an officer of the Court from which it was issued.[4] A complaint, warrant, or other proceeding under the Summary Jurisdiction Act, 1908, may be served or executed at any place within Scotland without endorsation, by any officer of law.[5] And by virtue of the Criminal Law (Scotland) Act, 1830, it is lawful for any officer of the law, when lawfully conveying any prisoner to any gaol or before any magistrate, to convey such prisoner through any county adjoining to that over which the magistrate possesses jurisdiction before whom such prisoner is to be carried for examination, or to that in which the gaol is situated to which such prisoner is to be committed, in the same way in all respects as if such officer had been an officer of the county through which he may so pass, and as if the warrant under which he is acting had been granted or endorsed by a magistrate of such county.[6] This, be it observed, merely covers conveyance and does not extend to arrest.

Subsection (3).—*Scotland, England, and Wales.*

498. A constable appointed for a border county, viz. Northumberland, Cumberland, Berwick, Roxburgh, or Dumfries, can execute

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[1] *Parr* v. *Henderson*, 1879, 4 Coup. 252; 6 R. (J.) 48; *Spowart* v. *Burr*, 1895, 1 Adam 539; 22 R. (J.) 30. See 8 Edw. VII. c. 65, s. 23 (1), as affecting cases for summary trial.

[2] Hume, ii. 79; Alison, ii. 124.

[3] Hume, ii. 78.

[4] 1 & 2 Vict. c. 119, s. 25.

[5] 8 Edw. VII. c. 65, s. 25.

[6] 11 Geo. IV. & 1 Will. IV. c. 37, s. 6.

without endorsation, within any of these counties, a warrant for the apprehension of a criminal accused or convicted of a crime committed in the county for which he is appointed a constable.[1] Under the Indictable Offences Act, 1848, a warrant issued in England or Wales by a judge of a superior Court, or by a Justice of the Peace, may be endorsed by a Sheriff or Justice of the Peace in Scotland; and a warrant issued in Scotland by a judge of the High Court of Justiciary, a Sheriff, a Justice of the Peace, or a burgh magistrate, or a warrant, order of Court, or process issued under the Summary Jurisdiction (Scotland) Act, 1908, may be endorsed by a Justice of the Peace in England or Wales. After being thus backed, the warrant may be executed within the jurisdiction of the endorsing magistrate, either by the person who brings it, or by any person to whom it was originally addressed, or by a constable or other officer of the law for the place where it is endorsed.[2] The prisoner is conveyed directly into the jurisdiction whence the warrant was issued, and taken before a magistrate there.[3] All citations, warrants, and other process (except warrants of arrestment) issued under the Summary Jurisdiction Acts, may be reciprocally executed, after being backed, in England or Scotland.[4]

Subsection (4).—*Scotland and Ireland.*

499. Scottish warrants may be executed in Ireland, and Irish warrants in Scotland, after backing in terms of the Indictable Offences Act, 1848.[5] They may also be backed in Ireland by an inspector-general, or deputy inspector-general, or (in their absence) assistant inspector-general of constabulary, or by a Justice of the Peace, in the form annexed to the Petty Sessions (Ireland) Act, 1851.[6]

Subsection (5).—*Scotland and Channel Islands.*

500. The provisions of the Indictable Offences Act, 1848, apply to the execution of Scottish warrants in the Channel Islands, and *vice versa.*[7]

Subsection (6).—*Scotland and British Possessions and Foreign Countries.*

501. The cases of arrest in British possessions and foreign countries of persons wanted in Scotland, and also of arrest in Scotland of persons wanted on warrants issued in British possessions or by foreign Governments, are the subject of special and elaborate legislative provisions which are noticed below.[8] In all these cases, backing of the warrant or some equivalent is essential.

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[1] 20 & 21 Vict .c. 72, s. 11.

[2] 11 & 12 Vict. c. 42, ss. 14 and 15; 31 & 32 Vict. c. 107; 44 & 45 Vict. c. 24; 8 Edw. VII. c. 65, s. 25.

[3] *Ibid.; Sinclair* v. *H.M. Advocate*, 1890, 2 White 481; 17 R. (J.) 38.

[4] 44 & 45 Vict. c. 24.

[5] 11 & 12 Vict. c. 42, ss. 14, 15; 12 & 13 Vict. c. 69, ss. 14, 15; 8 Edw. VII. c. 65, s. 25.

[6] 14 & 15 Vict. c. 93, ss. 27–31; 40 & 41 Vict. c. 56, s. 77; 30 & 31 Vict. c. 19, s. 1.

[7] 8 Edw. VII. c. 65, s. 25.

[8] Para. 503 *et seq.*

SUBSECTION (7).—*Form of Backing.*

502. The following is the usual backing:—

Whereas proof upon oath hath this day been made before me [one of His Majesty's Justices of the Peace in and for the county of York], that the name of "Ralph Pearson," to the within warrant subscribed, is of the handwriting of the [Sheriff-Substitute] within mentioned—I do therefore hereby authorise [William Ferguson], police constable for [Inverness-shire], Scotland, who bringeth to me this warrant, and all other persons to whom this warrant was originally directed, or by whom it may lawfully be executed, and also all constables and other peace officers of the said county of [York], to execute the same within the said last-mentioned county. Given under my hand this [ninth day of January 1909].

(*Signed*) [GEORGE MEDD, J.P.]

The officer who brings the warrant must depone or declare that it is signed by the magistrate who issued it. Other evidence is required in certain cases.[1] To enable the warrant to be backed without the attendance of an officer of the issuing Court, a declaration in the following form may be written upon it:—

I, A. B., inspector of police of [Inverness], in the county of [Inverness], solemnly declare that the name of ["Ralph Pearson"], to the within warrant subscribed, is of the handwriting of the [Sheriff-Substitute] within mentioned. Dated at Inverness this 7th day of January 19 .

(*Signed*) A. B.

(„) { C. D., Justice of the Peace for the County of [Inverness].

It is backed by a magistrate of the place where it is to be executed, on production by an officer of that jurisdiction. The foregoing is the general procedure, but the practice varies in different Courts.

SECTION 5.—FUGITIVE OFFENDERS.

SUBSECTION (1).—*General.*

503. A fugitive offender is primarily a person who is accused of having committed in one part of His Majesty's dominions an offence within the meaning of the Fugitive Offenders Act, 1881,[2] and who has left that part and is found in another part (s. 2). But the term also includes a person convicted of such an offence who is unlawfully at large before the expiration of his sentence (s. 34). The statute applies to treason, piracy, and every offence which is punishable in the part of His Majesty's dominions in which it was committed, either on indictment or information, by imprisonment with hard labour, rigorous imprisonment, or confinement in prison combined with labour, for a term of twelve months or more, or by any greater punishment, not-

[1] 11 & 12 Vict. c. 42, ss. 14, 15; 44 & 45 Vict. c. 24, s. 4. [2] 44 & 45 Vict. c. 69.

withstanding that it may not be an offence in the part where the fugitive is, or to which he is on his way (s. 9). The following countries are each deemed to form one part of His Majesty's dominions: (*a*) the British Isles, *i.e.* Great Britain and Ireland, Isle of Man, and Channel Islands (s. 37); (*b*) any other British possession, *i.e.* a territory or group of territories forming part of His Majesty's dominions under one central Legislature (s. 39); and (*c*) as regards British subjects and persons subject to the King's jurisdiction, and under the conditions of each Order, any place out of His Majesty's dominions in which His Majesty has jurisdiction, and to which the Act has been extended by Order in Council, *e.g.* Cyprus, Turkey, Egypt, China, Japan, Corea, Zanzibar, Morocco, Siam, Persia, various parts of Africa, Pacific Ocean and Islands, etc. (s. 36).

504. The procedure incidental to securing the apprehension of persons falling within the scope of the Act is complicated and technical. In applying it the terms of the Act afford the standard guide, and must be referred to by anyone having to apply it. The points requiring attention are also for the most part matters more appropriate to administration than to general procedure, and a full exposition of them is beyond the scope of this article.

Subsection (2).—*Fugitive from Scotland.*

505. These observations are specially applicable to the case of an accused person, wanted for trial before the Scottish Courts for a crime committed in this country, who has fled to another part of the Empire. The procedure generally commences with the issue of a warrant for arrest in the ordinary way. But on it being found that the accused person has left Scotland and is in, or on his way to, a place to which the Act applies, the police inform the Procurator-Fiscal, who reports to the Crown agent. The latter communicates with the Lord Advocate, and through the Scottish Office with the Home Secretary. If the original warrant has been hastily prepared it may be found desirable that a new one be made out (for the purpose of transmission for endorsation and use in the place where it is to be executed) on a new petition or information containing greater detail. It is essential that it should contain a statement that the offence charged is punishable in Scotland by at least twelve months' imprisonment with hard labour (s. 9). A special form is indicated in a Colonial Office Circular of 6th July 1907, to which and to the provisions of the Act reference is made for fuller details. The warrant with relative depositions and other documents necessary are transmitted through the Crown Office and the Scottish Office to the Home Secretary, after which the subsequent procedure is strictly administrative.

506. The arrest is effected through the dominion or colonial authorities, the accused being handed over to the custody of an officer sent out from Scotland, who brings his prisoner to this country as authorised by the Act (ss. 25, 26). An endorsement of the warrant under the Act

is an authority to any person named in the endorsement, as well as to the person to whom the warrant was originally issued and every constable, to effect the arrest and bring the accused before a magistrate in the place of endorsement (s. 26). The officer from Scotland thereafter brings his prisoner to this country, as provided by the Act (ss. 25, 27). On arrival in Scotland the prosecution proceeds in ordinary course. If the accused be committed upon a proper warrant of a competent magistrate it appears that allegations of irregularities in the earlier procedure will not avail to invalidate the commitment.[1]

Subsection (3).—*Fugitive to Scotland.*

507. The matter of arrest in Scotland of one who has fled hither from some other part of the Empire outwith the British Isles by the authorities of which his arrest is sought is more strictly within the scope of Scottish criminal procedure, and the requisites may be noticed in somewhat fuller detail. But here again the Act ought to be consulted for its exact terms at every stage by those having occasion to apply it.

508. When it is suspected or discovered that a fugitive has left a place to which the Act applies, and is in, or on his way to, Scotland, the Government, or the judicial or police authority of that place, gives information to the Scottish police by letter or telegram, stating that such person has committed a certain offence, that a warrant of arrest has been issued, and that proceedings for his return will be taken under the statute. The fugitive may be apprehended either under a provisional warrant or an endorsed warrant (s. 2). In case of urgency, a police officer or a representative of the colony presents to any Sheriff or Sheriff-Substitute a petition or information, craving him to issue a provisional warrant for the apprehension of the fugitive (ss. 4 and 5). The Sheriff may grant the warrant on such information and under such circumstances as would, in his opinion, justify its issue if the offence had been committed within his jurisdiction. It may be backed for execution outside his territory (s. 4). He must forthwith send to the Home Secretary a report of the issue of the warrant, together with the petition or information and depositions (if any), or certified copies. The Home Secretary may, if he think fit, discharge the person apprehended under the warrant (s. 4). The fugitive, when apprehended, is taken before a magistrate in the usual course, and is by him remitted to the Sheriff or Sheriff-Substitute of the county of Edinburgh (s. 30). The officer who made the arrest accompanies his prisoner to Edinburgh, and attends the hearing there. If an "endorsed warrant" cannot at once be produced, the Sheriff of Edinburgh may remand the prisoner from time to time not exceeding seven days at any one time, to allow of its production (s. 5). An endorsed warrant is one issued in the part which the fugitive has left, and endorsed (as regards fugitives in

[1] *Sinclair* v. *H.M. Advocate*, 1890, 2 White 481; 17 R. (J.) 38.

Scotland) by the Home Secretary, or one of the police magistrates at Bow Street, or a judge of the High Court of Justiciary (ss. 3 and 39), any one of whom may endorse the warrant, if satisfied that it was issued by some person having lawful authority to do so (s. 3). The endorsement is signed by the endorsing authority (s. 26). It authorises all or any of the persons named in the endorsement, and of the persons to whom the warrant was originally directed, and also every police constable and officer of the law within the British Isles, to execute the warrant by apprehending the fugitive and bringing him before a magistrate (*ibid.*). When such a warrant, duly endorsed and authenticated, is presented to a Sheriff, it must be received by him as a warrant regular and valid in all respects.[1]

509. When the fugitive has been apprehended on an endorsed warrant (or if he has been apprehended on a provisional one, after production of an endorsed warrant), the Sheriff of Edinburgh hears the case (s. 5). He has, subject to the provisions of the Act, the same jurisdiction and powers, and proceeds in the same manner, as if the fugitive were charged with an offence committed within the county of Edinburgh. He satisfies himself: (*a*) that the warrant is duly endorsed and authenticated; (*b*) that the prisoner is sufficiently identified as the person named in the endorsed warrant; (*c*) that the offence charged is one to which the Act applies; and (*d*) that, upon the evidence produced, a strong or probable presumption according to the law of Scotland is raised that the prisoner committed such offence. These points may be established by depositions, official certificates, and judicial documents, authenticated in the manner specified in the Act (s. 20). A copy of a Colonial Act, which purports to be printed by the Government printers, is evidence in any Court of Justice in the United Kingdom.[2] If satisfied, the Sheriff commits the fugitive to the prison of Edinburgh, to await his return; informs him that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for liberation to the High Court of Justiciary; and forthwith sends to the Home Secretary a certificate of the committal, and such report of the case as he may think fit (ss. 5 and 29).

510. The prisoner may present to the High Court of Justiciary a bill of suspension and liberation; [1] and that Court may, on sufficient grounds being shewn: (*a*) discharge him absolutely; (*b*) liberate him on bail; (*c*) order that he shall not be returned until after a specified period; or (*d*) make such other order as seems just (s. 10). In England the King's Bench Division can admit to bail.[3] There is no appeal to the Court of Appeal against the refusal of a Divisional Court to issue a writ of *habeas corpus*.[4] Upon the expiration of fifteen days after the fugitive has been committed to prison (if he does not apply to the High Court), or after the final decision of the Court (if his application has

[1] *Carlin* v. *Cape Colony Government*, 1885, 5 Coup. 649; 12 R. (J.) 50.
[2] *Ex parte Percival*, [1907] 1 K.B. 696.
[3] *Reg.* v. *Spilsbury*, [1898] 2 Q.B. 615. [4] *Ex parte Savarkhar*, [1910] 2 K.B. 1056.

been refused), the Home Secretary may, if he thinks it just, grant warrant for his return. The Act makes provision for the temporary detention in custody of a person accused, and removal to the part from which he fled (ss. 25, 27, and 28). If he is not removed within one month after his committal, the High Court of Justiciary will, on his application, order his discharge from custody, unless sufficient cause is shewn to the contrary (s. 7). After his arrival at the place from which he fled, if he is not prosecuted for the offence charged within six months, or if he is acquitted, the Governor of that place may, on his request, cause him to be sent back to Scotland free of cost, and with as little delay as possible (s. 8).

511. It has to be observed generally that the expenses of arresting and procuring the return of a fugitive are to be borne by the Government or the individual applying for his return, and cannot be charged either to imperial or police funds. Therefore, except in the event of emergency, where the loss of a few hours would be irretrievable, the police must incur no expenditure and take no steps towards such arrest unless they are acting under instructions from the Procurator-Fiscal, and the latter has obtained an adequate indemnity or the necessary authority from the Lord Advocate.

Subsection (4).—*Extradition.*

512. The arrest and recovery of persons accused of crime who have fled from Scotland to a foreign country, or who, being accused of crime committed in a foreign country, have come here and are wanted by the authorities of the country from which they have fled, are regulated by a series of statutes known by the collective title of "The Extradition Acts, 1870 to 1906," comprising the Extradition Acts of 1870,[1] 1873,[2] 1895,[3] and 1906.[4] The procedure for obtaining the surrender of a fugitive from Scotland who has fled to a foreign country is essentially administrative and is conducted through the Foreign Office and the appropriate diplomatic agent to the country concerned. Similarly the procedure for securing a person who has fled to Scotland and who is wanted by the authorities of a foreign State with a view to trial for crime originates and is mainly carried out through diplomatic channels. It will be found described more fully under the title Extradition.

513. In the latter case, the actual warrant for arrest is normally a warrant issued by a magistrate of the Metropolitan Police Courts [5] upon an order in statutory form [6] made by a Secretary of State following upon requisition of a diplomatic representative of the foreign State. This warrant runs in Scotland without endorsation.[7] In cases of urgency arrest may be made on a warrant by a Justice of Peace on such information or complaint and evidence as would in his opinion

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[1] 33 & 34 Vict. c. 52.
[2] 36 & 37 Vict. c. 60.
[3] 58 & 59 Vict. c. 33.
[4] 6 Edw. VII. c. 15.
[5] Extradition Act, 1870, s. 26.
[6] *Ibid.*, Schedule 2.
[7] *Ibid.*, s. 13.

justify the issue of a warrant if the alleged crime had been committed in Scotland.[1] Immediate intimation must, however, be made by the justice to a Secretary of State that the warrant has been issued; and it is provided that the person arrested without the order of a Secretary of State shall be liberated by the magistrate unless within a reasonable time to be fixed by him he receives from a Secretary of State an order signifying that a requisition has been made for the surrender of the criminal.[1] On apprehension the fugitive is taken in the usual case to London and brought before a magistrate at Bow Street, and thereafter the proceedings as prescribed by the statutes are carried through in England. But under the Act of 1895 the Secretary of State may, on representation being made to him on behalf of the accused person that his removal to Bow Street would be dangerous to his life or health, direct the case to be heard at the place where the criminal is, before a magistrate named in the order—who in Scotland may be a Sheriff or Sheriff-Substitute. And the magistrate who is asked to commit the criminal on apprehension, if he is of opinion that it would be dangerous to the life or prejudicial to the health of the party to have him removed, may himself make a suitable order for his immediate custody.[2] In such a case the magistrate must be careful in the subsequent proceedings to follow with precision the provisions of the Act.

Section 6.—Proceedings immediately following Arrest.

Subsection (1).—*Detention.*

514. Upon apprehension, the officer may take his prisoner to a police station-house, or other suitable place of detention, if that course is rendered necessary by the lateness of the hour, the distance from the magistrate, or other good and sufficient cause; otherwise he must bring him with all convenient speed before a magistrate, for examination or trial, according to the terms of the warrant.[3] Detention for a lengthened period without satisfactory explanation is illegal.[4] The Court has emphasised the propriety, especially in cases of charges of serious crime, such as murder, of keeping prisoners apart from the investigations of the police, in the course of which a prisoner might be led inadvertently to make an unconsidered statement.[5]

Subsection (2).—*Legal Advice.*

515. Immediately on apprehension upon a warrant for examination and commitment on a criminal charge, the prisoner is entitled to have intimation sent to any qualified law agent whom he may choose, that his professional assistance is required, and that the prisoner is to be

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[1] Extradition Act, 1870, s. 8. [2] 1895 Act, s. 1 (3).

[3] Hume, ii. 80; Alison, ii. 129; *Crawford* v. *Blair*, 1856, 2 Irv. 511; *Maitland* v. *Douglas*, 1861, 24 D. 193.

[4] *M'Donald*, 1851, 1 Stuart 120. [5] *H.M. Advocate* v. *Lieser*, 1926, J.C. 88.

taken to a certain place for examination.[1] The agent is entitled to be present at the examination, and may demand a private interview with the prisoner previous to it. The magistrate may delay the examination for a period not exceeding forty-eight hours from the arrest, to allow time for the attendance of the agent.[1] An interpreter ought to be procured where necessary in the case of a foreigner. In the case of a youthful offender, the provisions of the Children Act, 1908, must be carefully observed. They are too complicated for insertion here, but it may be remarked that a child (a person under fourteen) or a young person (one between fourteen and sixteen) cannot be detained in custody, except in the special circumstances enumerated in the statute.[2] If a person apprehended is believed to be of unsound mind, the provisions of the Lunacy (Scotland) Act, 1862,[3] s. 15, must be kept in view.

Subsection (3).—*Bail.*

516. Where the arrest has been made on an endorsed warrant, the first step is to bring the prisoner before a magistrate of the bounds to which the endorsement applies in order that the question of bail may be dealt with. If the magistrate is not prepared to allow bail, or the prisoner is not prepared to find it, he is remanded by the magistrate to the custody of the officer to be conveyed to the place where the warrant was originally issued. Where an arrest is made in England of a Scottish offender, the officer on receiving the prisoner from the magistrate should convey him before a magistrate of a county adjacent to England.[4] But where a railway can be readily reached in England, there is no need for the observance of this rule.[5] Where, however, a prisoner was conveyed by sea to a county not adjacent to England, this was in an old case held to be illegal.[6]

Subsection (4).—*Judicial Examination and Declaration.*

517. As has been seen, on the apprehension of a person on a criminal charge which is considered too serious to be disposed of summarily, the first step is to bring him promptly before a magistrate for examination, declaration, and commitment for trial. Formerly the initial and very important part of this stage was the examination and emission by the accused of a judicial declaration. But by the Summary Procedure Act, 1908, it is provided that, where the accused is brought before the Sheriff for examination on any charge and he or his agent intimates that he does not desire to emit a declaration in regard to such charge, it shall be unnecessary to take a declaration, and the accused may be committed for further examination or until liberated in due course of law without a declaration being taken, the fact of his not desiring to

[1] 51 & 51 Vict. c. 35, s. 17.
[2] 8 Edw. VII. c. 67. ss. 94, 95, and 96.
[3] 25 & 26 Vict. c. 54.
[4] 11 & 12 Vict. c. 42, s. 15; 12 & 13 Vict. c. 69, s. 15.
[5] Cf. *Sinclair* v. *H.M. Advocate*, 1890, 2 White 481; 17 R. (J.) 38.
[6] *Matthews* v. *Glasgow Iron Co.*, 1836, 1 Swin. 393.

emit a declaration being recorded in the warrant of commitment, but without prejudice to the accused subsequently emitting a declaration should he intimate to the prosecutor his desire to do so.[1] It was laid down prior to the passing of this provision that in cases of a serious nature the prisoner ought to be informed of his rights under s. 17 of the Criminal Procedure Act, 1887, to have access to a law agent.[2] And the terms of s. 77 (1) of the Summary Procedure Act, 1908, imply that the accused is entitled to have the advice of his law agent as to whether or not he should emit a declaration at all. The proper course to pursue in any serious charge therefore seems to be for the examining magistrate *in limine* to inform the accused of his rights under the Criminal Procedure Act and if necessary to delay the examination for a period not exceeding forty-eight hours to allow time for the attendance of an agent. It may be observed that in most districts of Scotland, though not, it is understood, in all, the law agents for the poor do in practice attend examinations on declaration where their services are requested by the accused.[3]

518. The course sanctioned by the provision just noticed is frequently adopted by persons accused; and in many cases the party charged declines to emit a declaration. But on the other hand there are many cases in which he does not desire to take this course or is advised not to do so. And in these cases the procedure before the magistrate follows the lines of that which was formerly invariable, the magistrate proceeding with the judicial examination and to take the declaration. In the matter of declining to emit a declaration, the terms of the section quoted above give to the agent the right not merely to be consulted, but, if he and his client so desire, to be the mouthpiece of the accused in stating the declinature. But where, failing declinature, the examination proceeds, the function of the law agent becomes merely advisory, and it would seem that he is not entitled to intervene in the examination, as the Act of 1887 provides that this is to be conducted according to the practice previously existing.[4]

519. The Sheriff or magistrate may be either the judge before whom the accused is first brought, or another magistrate to whom he is remitted by the first. It is not necessary that the magistrate before whom the declaration is emitted should have power or jurisdiction to try the offence charged. A person who is not a magistrate cannot preside at a judicial examination.[5] A declaration may be emitted before an honorary Sheriff-Substitute, or a person acting temporarily and gratuitously as a Sheriff-Substitute.[6] In this matter it is incompetent for a sheriff-clerk to act as Sheriff-Substitute by deputation.[7]

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[1] 8 Edw. VII. c. 65, s. 77 (1).

[2] See para. 515, *supra* ; and *H.M. Advocate* v. *Goodall*, 1888, 2 White 1 ; 15 R. (J.) 82.

[3] *Cf.* per Lord M'Laren in *H.M. Advocate* v. *Goodall*, *supra*. [4] 50 & 51 Vict. c. 35, s. 17.

[5] *Erskine*, 1818, Hume, ii, 327, note (*a*) ; *Hughes*, 1811, and *Ronald and Ors.*, 1817, Hume, ii. 329, note 1.

[6] *Mabon and Shillinglaw*, 1842, 1 Broun 201 ; Bell's Notes, p. 151.

[7] *John Stewart*, 1857, 2 Irv. 614 ; 29 Sc. Jur. 344.

The Sheriff or magistrate must be present during the examination, in order to protect the accused from unfair examination. A declaration emitted in the absence of the magistrate will not be admitted in evidence.[1] In practice the questions are put by the Procurator-Fiscal. But the principle of the law is, that "when anyone is apprehended upon an accusation of crime and taken before a magistrate, he is himself at liberty to offer any explanation of the circumstances which he knows, or of those which are brought to his knowledge by the magistrate; and that the magistrate is not only entitled, but bound to give him an opportunity of offering an explanation, either generally, or upon any particular matters which the magistrate thinks require explanation. . . . No questions should be put by the Procurator-Fiscal at any time before the magistrate; and when the prisoner intimates that he declines to answer further questions, none should be put by anyone." [2]

520. The prisoner must be in his sound and sober senses. It is the duty of the magistrate to assure himself of his sanity and sobriety.[3] If he is satisfied that the accused is insane, he must record the fact, and no examination will take place.[4] He must inform the prisoner of the charge against him, and warn him that what he says may be used in evidence against him, and also that he may decline to answer any questions. "These solemnities are now so established, that their absence would probably invalidate the declaration, although formerly they were not held essential." [5] The prisoner's declaration must be voluntary. It must not be induced by threats or promises.[6] If the prisoner states that he declines to answer, this is taken down, and forms the declaration. It is not proper to interrogate him further.[2]

521. The declaration is written down. On the conclusion of the examination it must be read over, and the prisoner's amendments, if any, must be inserted.[7] The declaration is signed by the prisoner and Sheriff or magistrate. If the accused is unable to write, or declines to sign the declaration, this must be stated in the declaration, and the document is signed by the magistrate in his presence.[8] If during the examination any articles are shewn to the prisoner, sealed labels are attached to them and signed by prisoner and magistrate as relative to the declaration. The declaration ought to be written by a neutral person, the sheriff-clerk or his depute, and not by the Procurator-Fiscal or any depute of his.[9] It must be taken before two witnesses,[10]

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[1] *James Davidson*, 1827, Hume, ii. 327, note (*a*); *Macmillan*, 1858, 3 Irv. 213; Alison, ii. 560, 561; Macdonald, p. 265.

[2] Per Lord Young in *H.M. Advocate* v. *Brims*, 1887, 1 White 462.

[3] Hume, ii. 80, 328; Alison, ii. 559, 560; *Elder*, 1827, Syme 113; *Connacher*, 1823, S. (Just.) 108.

[4] *H.M. Advocate* v. *Robertson*, 1891, 3 White 6.

[5] Macdonald, p. 267.

[6] Hume, ii. 328, 329, 335, and cases cited; Alison, ii, 561 *et seq.*; Macdonald, pp. 266, 267, and cases cited.

[7] Hume, ii. 81, 330.

[8] Hume, *ibid.*; *Plenderleith or Dewar*, 1841, 2 Swin. 558; *French and Ors.* v. *Smith*, 1855, 2 Irv. 198.

[9] *Kelly*, 1843, 1 Broun 543; *Galbraith* v. *Sawers*, 1840, 3 D. 52.

[10] Hume, ii. 81.

who understand the language used by the prisoner.[1] The witnesses must sign the declaration.[2] The formal parts of a declaration may be either written or printed, or partly written and partly printed.[3] If the prisoner does not understand English, a sworn interpreter is employed.[4] Where the prisoner is deaf and dumb but can write, his declaration may be taken by means of a slate, a copy of what is written on the slate being then made, read over by him, and signed.[5]

522. The prisoner may be re-examined on declaration. He may be so re-examined even after commitment for trial,[6] but not after the libel has been served.[7] The discovery of further important evidence is a good ground for re-examination.[8] When he is re-examined, any previous declaration emitted by him must be read over to him.

Subsection (5).—*Commitment.*

523. Following on the examination the magistrate will, if he thinks the evidence from the precognition submitted and the declaration (if any) sufficient to establish a *prima facie* case for doing so, commit the accused to prison "until liberation in due course of law"; or if he thinks that further inquiry is necessary before doing this, he may commit for further examination. In the latter case the committal must be for a reasonable time,[9] it being, however, a question of circumstances what amounts to a reasonable time.[10] The duration of the commitment is now, however, of comparatively little importance, as the accused can, under the provisions of the Criminal Procedure Act, 1887, apply for bail at any time after he has been brought before a magistrate for examination.[11] There is indeed no right of appeal at this stage under the Bail Act, 1888,[12] if bail be refused. But presumably no magistrate would decline to allow bail where he thought a long remand necessary for further evidence, unless in very special circumstances.

524. When a prisoner has been duly committed for trial, it is not absolutely essential that he be separately committed for all the offences with which he may be charged at the trial.[13] It is the proper procedure, however, to commit him for all the charges which are to be made against him at the trial;[14] and in the case of *H.M. Advocate* v. *Thomson* [13] it was observed that it was a departure from established practice which should not be drawn into a precedent where the commitment had not been in

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[1] Burnett, p. 492, and cases there; Alison, ii. 570; *Mackenzie*, 1839, 2 Swin. 345.
[2] Hume, ii. 81.
[3] Criminal Procedure Act, 1887, s. 69.
[4] Alison, ii. 569, 570; *Campbell*, 1837, Bell's Notes, p. 243; *Mackenzie*, 1839, 2 Swin. 345.
[5] *Smith*, 1841, 2 Swin. 547.
[6] Hume, ii. 326; Alison, ii. 574; Macdonald, p. 269.
[7] Hume, ii. 331; Macdonald, p. 269.
[8] Macdonald, p. 269; *W. Smith*, 1854, 1 Irv. 378, per Lord Justice-Clerk Hope at p. 455.
[9] *Fife* v. *Ogilvy*, 1762, Mor. 11750; *Andrew* v. *Murdoch*, 1806, 13 F.C. 569; Buchanan, p. 1; Mor. "Wrongous Imprisonment," App. No. 3; and see 2 Dow 401.
[10] *Arbuckle* v. *Taylor*, 1815, 3 Dow 160.
[11] 50 & 51 Vict. c. 35, s. 18.
[12] 51 & 52 Vict. c. 36, s. 3.
[13] *H.M. Advocate* v. *Thomson*, 1875, 3 Coup. 104.
[14] *H.M. Advocate* v. *Keith*, 1875, 3 Coup. 125.

terms which covered all the offences with which the person committed was to be charged.

525. Three things are essential to commitment for trial: (1) a signed warrant, which either contains the accused's name and designation in the body of the warrant, or makes plain reference to the petition or information annexed to the warrant;[1] (2) a specification of the crime in the warrant, giving the time, *locus*, and *modus* of the offence;[2] (3) a signed information, which need not be a formal document, a letter being held to be sufficient. If a warrant is defective in any of these three essentials it will be suspended, and the accused will be liberated if, on intimation, a proper warrant is not obtained and served upon him. Commitment is not a necessary preliminary to indictment if the accused is not actually in custody.[3] Even if the person is arrested, such commitment is not necessary if he is admitted to bail after being committed for further examination.[4]

526. There must be served upon the accused, either before or immediately on imprisonment, a double of the warrant under the hand of the officer entrusted with it, or of the prison-keeper. Where there has been a petition, it is usual to serve a double of it also; but the accused is entitled to nothing more than a double of the warrant.

527. A warrant of commitment till liberated in due course of law remains in force until final sentence where the accused pleads guilty,[5] and also where a diet is deserted *pro loco et tempore*, or is postponed or adjourned, or an order issued for the trial to be held at a different place from that first fixed upon.[6]

Section 7.—Search-Warrant.

528. At a stage prior to, and in order to obtain the evidence requisite for commitment, it may be necessary to recover articles or documents, and in order to do this to obtain authority to enter upon or even to break open and to search places in which these are likely to be. This authority takes the form of a search-warrant, granted by a Court of competent jurisdiction (generally that which grants the warrant to arrest), and it authorises officers of the law to break open and search the places mentioned in the warrant in order to recover the articles or documents mentioned in it. Authority to search is usually asked when the warrant to arrest is applied for, and, if granted then, is embodied in the warrant to arrest. It is competent, however, to crave and to obtain a special search-warrant. It is essential that a search-warrant should specify the places which it is proposed to search, and the articles of which seizure is desired. A warrant to "break or force open all shut

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[1] 1701, c. 6; *Philp* v. *Mags. of Easter Anstruther*, 1748, Mor. 13953.
[2] 50 & 51 Vict. c. 35, s. 16; *Mure* v. *Sharpe*, 10th July 1811, F.C.
[3] *H.M. Advocate* v. *Keith*, 1875, *supra*; *H.M. Advocate* v. *Thomson*, *supra*.
[4] 50 & 51 Vict. c. 35, s. 18.
[5] *Ibid.*, ss. 31 and 34.
[6] *Ibid.*, s. 52.

and lockfast places" was held to be illegal.[1] It is competent to grant a search-warrant to examine the repositories of a person charged with a crime for articles or documents tending to establish his guilt of the charge. If documents are recovered under this warrant and used at the trial, the prosecutor is not bound to produce the search-warrant nor to prove the manner in which the documents were recovered.[2] And there is a considerable weight of authority for the view that where documents or articles in the hands of the prosecutor are adduced by him in evidence, if their contents and the circumstances under which they have been found be relevant to the charge, the competency of evidence as to these matters is not affected by the fact that the productions have been recovered in the course of executing a search-warrant which did not cover them;[3] or even in a search made without a warrant at all, which might give rise to a civil claim of damages;[4] but due notice must be given in the list of productions.[5] It was held to be illegal to grant a search-warrant to search the repositories of persons who had not been charged with a crime "for written documents, and all other articles tending to establish guilt or participation in said crimes," for these reasons: (1) that no charge had been made against the persons whose repositories were proposed to be searched; (2) that no limitation of kind or quantity was placed upon the documents proposed to be recovered; (3) that the result of such a search under such a warrant would be that ordinary sheriff-officers and their assistants might seize and examine the whole papers of the persons whose repositories were ordered to be searched for the purpose of finding traces or proofs of guilt either against the owners and possessors of the papers, or against some other person or persons.[6]

529. The Prevention of Crime Act, 1871,[7] provides that any chief officer of police may give authority to search for stolen property, when the premises to be searched (1) are or have been within the preceding twelve months in the occupation of any person who has been convicted of reset or of harbouring thieves, or (2) are in the occupation of any person who has been convicted of any offence involving fraud or dishonesty, and punishable by penal servitude or imprisonment; and he may do so without specifying any particular property, if he has reason to believe generally that the premises are being made a receptacle for stolen goods; and any constable, with such authority in writing from the chief constable, may enter any shop, warehouse, yard, or other premises, and search and seize and secure any property he may believe to have been stolen, as if he had a search-warrant applicable to the property seized; and the person on whose premises the property is when seized,

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[1] *Webster* v. *Bethune*, 1857, 2 Irv. 596.
[2] *Porteous*, 1867, 5 Irv. 456.
[3] *Hodgson* v. *Macpherson*, 1913 S.C. (J.) 68; 7 Adam 118; *H.M. Advocate* v. *Walsh*, 1922, J.C. 82.
[4] *Crook* v. *Duncan*, 1899, 2 Adam 658; 1 F. (J.) 50.
[5] *H.M. Advocate* v. *Monson*, 1893, 1 Adam 114; 21 R. (J.) 5.
[6] *Bell* v. *Black and Morrison*, 1865, 5 Irv. 57.
[7] 34 & 35 Vict. c. 112, s. 16.

or the person from whom it is taken if other than the person on whose premises it is, shall, unless previously charged with resetting the same, be summoned before a Court of summary jurisdiction to account for his possession of such property; and the Court may make such order as to the disposal of the property, and may award such costs, as the justice of the case may require.

530. In executing a search-warrant, as in effecting an arrest upon warrant, the officer should state the substance of the warrant. He should proceed to break open doors only after admission has been asked and refused. The officer should shew the warrant if requested to do so, especially if he is only acting as an officer *pro hac vice* or is beyond his ordinary bounds.[1]

Section 8.—Bail.

Subsection (1).—*Definition and History.*

531. Bail is the judicial security given as a condition of liberation by a person accused of a crime or offence, to ensure appearance in answer to the charge. From the commencement of the eighteenth century until about forty years ago, the right of an accused person to bail was normally governed by the Act 1701, c. 6, both in regard to the classes of crime which were bailable and the amount of bail which could be exacted. Under this statute the right which at common law an accused person generally had of being at large until the time of trial on suitable security to underlie the law was taken away in the large number of cases of crime which were then and for long afterwards technically capital, and maximum amounts of bail in cases which were bailable were fixed on a scale related to the social position of the party charged. But these limitations of amount were only applicable to crimes bailable under that Act. And the High Court of Justiciary or the Lord Advocate always had, the former the power to allow, and the latter the power to accept, bail even for crimes which were not bailable under the Act—the amount then being matter of discretion. Moreover, the maximum amounts were further subject to qualification under statute in cases of persons accused of certain statutory offences (*e.g.* against the Inland Revenue) and of sedition.

532. Important changes in the law were made by the Criminal Procedure (Scotland) Act, 1887,[2] and the Bail (Scotland) Act, 1888.[3] By the latter Act the Act 1701, c. 6, was repealed; and present-day procedure is practically regulated entirely by the two Acts of 1887 and 1888, and in the case of criminal appeals by the Criminal Appeal (Scotland) Act, 1926.[4] All statutory limitations on the amount of bail are by the Bail Act, 1888, abolished.[5] It would, therefore, serve no good purpose to enter into any detailed exposition of the provisions

[1] See generally Hume, ii. 78; Alison, ii. 145; Macdonald, p. 287; Anderson, Criminal Law, p. 195.
[2] 50 & 51 Vict. c. 35.
[3] 51 & 52 Vict. c. 36.
[4] 16 & 17 Geo. V. c. 15, s. 9.
[5] 51 & 52 Vict. c. 36, s. 4.

of the old Act, or the numerous decisions by which it and the other statutes dealing with the amount of bail were elucidated during the long term of its currency. Those interested will find these matters fully dealt with in the works of Hume and Alison.[1]

Subsection (2).—*Bail before Commitment.*

533. By the Criminal Procedure Act, 1887,[2] it is provided that any person accused of a bailable crime (*i.e.* all crimes except murder and treason [3]) may, immediately after he has been brought before a magistrate for examination, apply to such magistrate or to the Sheriff or his Substitute for liberation, on his finding caution in common form to appear at any diet to which he may be cited for further examination or in order to answer any complaint or indictment which may be served upon him. The prosecutor is entitled to be heard against any such application; and the Sheriff or other magistrate may, in his discretion, refuse such application before the accused is committed until liberated in due course of law. When the accused is liberated thus on bail, before commitment, it is not necessary to commit him, but it is lawful to serve him with a complaint or indictment without his having been previously committed.[2] Appeal is not competent against a refusal of liberation on bail before commitment.[4] But where bail has been refused before commitment, the application may be renewed after commitment,[5] and the matter of appeal is then subject to the rules stated in the following subsection.

Subsection (3).—*Bail after Commitment.*

534. By the Bail Act, 1888,[6] it is provided that all crimes except murder and treason are bailable, and any magistrate (*i.e.* either the Sheriff or the Sheriff-Substitute [7]) having jurisdiction to try the offence of which the accused is charged, or to commit him to prison, may, at his discretion, on the application of any person who has been committed until liberation in due course of law, grant or refuse bail. Before disposing of such application, opportunity must be given to the prosecutor to be heard, and it must be disposed of by the magistrate within twenty-four hours after presentation, failing which the accused must be liberated. The power of the Lord Advocate and the High Court of Justiciary to admit to bail any person charged with any crime, including murder and treason, is preserved.[8] Under the earlier practice it was recognised that there was an inherent power in the High Court of Justiciary to liberate upon bail persons accused even of capital crimes

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[1] Hume, ii. 90 *et seq.*; Alison, ii. 167 *et seq.*
[2] 50 & 51 Vict. c. 35, s. 18.
[3] 51 & 52 Vict. c. 36, s. 2.
[4] *Ibid.*, s. 5; and *H.M. Advocate* v. *Lowson*, 1909, 6 Adam 118; 1909, 2 S.L.T. 329.
[5] 51 & 52 Vict. c. 36, s. 3.
[6] 35 & 36 Vict. c. 36, s. 2.
[7] *Ibid.*, s. 9.
[8] *Ibid.*, s. 8.

if it should be deemed essential to the ends of justice;[1] and there is no reason to suppose that this power has been abridged.

535. Where, after commitment until liberation in due course of law, an application for bail has been refused, or the accused is dissatisfied with the amount of caution ordered to be found, he may appeal to the High Court of Justiciary.[2] Either before or after commitment until liberated in due course of law, the public prosecutor (*i.e.* "any prosecutor acting for the public interest in the High Court of Justiciary or the Sheriff Court"[3]) has the right to appeal against the accused being liberated on bail, as well as on the ground of the amount fixed being too small, and the accused cannot be liberated until the appeal is disposed of, except as provided for in case of undue delay in disposing of the appeal.[4] Although, as already pointed out, the accused has no right of appeal, either against refusal of bail or against the amount of bail fixed, before he is fully committed,[5] one who has been so committed may then appeal against the amount of bail fixed under an allowance of bail granted before commitment.[6] Written notice of appeal must be immediately given by the party appealing to the opposite party.[5] The appeal is disposed of by the High Court or any Lord Commissioner of Justiciary in Court, or in Chambers, after such inquiry and hearing as seems just.[7]

536. The Court may liberate on bail although the Lord Advocate opposes.[8] And in a very recent case the rule was deliberately laid down as being that where a person charged with any crime except murder or treason applies for bail, the Court must grant it, unless in the exercise of its discretionary right of refusal it is of opinion that, looking to the public interest and to securing the ends of justice, there is good reason why bail should not be granted.[9] This right of refusal is not limited to cases where the Court thinks that there is danger that the accused may abscond.[9] It may be founded on considerations relating to public safety,[9] to the safety of victims of the crime charged,[10] to the safety or independence of witnesses, to the previous lawless record of the accused,[11] or to the serious nature of the crime charged.[12] If the Lord Advocate assures the Court that, in his view, the effect of so liberating the prisoner will in all likelihood defeat the ends of justice by the

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[1] *H.M. Advocate* v. *Thomson*, 1871, 2 Coup. 103.
[2] 35 & 36 Vict. c. 36, s. 5.
[3] *Ibid.*, s. 9.
[4] 51 & 52 Vict. c. 36, s. 7.
[5] *H.M. Advocate* v. *Lowson*, 1909, 6 Adam 118.
[6] 51 & 52 Vict. c. 36, s. 5.
[7] *Ibid.*; and see *Wilson* v. *M'Guire*, 1889, 2 White 267; 16 R. (J.) 89; *Scott* v. *H.M. Advocate*, 1890, 2 White 570; 18 R. (J.) 15; *Sutherland* v. *Brims*, 1891, 2 White 576; *Hobbs* v. *H.M. Advocate*, 1893, 3 White 487; 20 R. (J.) 62. The following unreported cases may also be referred to: *P. F. Dornoch*, H.C., Edinburgh, 5th July 1893; *Thomas James Fraser*, H.C., Edinburgh, 31st October 1893; *John and Finlay Macdonald*, H.C., Edinburgh, 31st March 1894; *William Dickson*, H.C., Edinburgh, 7th October 1895.
[8] *A. B.* v. *Dickson*, 1907, 5 Adam 372; 1907 S.C. (J.) 111.
[9] *Mackintosh* v. *M'Glinchy*, 1921, J.C. 75.
[10] *H.M. Advocate* v. *Saunders*, 1913, 7 Adam 76; 1913 S.C. (J.) 44.
[11] *H.M. Advocate* v. *Quinn and Anr.*, 1921, J.C. 61; see observations per Lord Salvesen.
[12] *Scott* v. *H.M. Advocate, supra*; *Wilson* v. *M'Guire, supra.*

prisoner absconding, the Court will give weight to that statement, and it is unlikely that in such circumstances the Court would grant liberation on bail. Thus where persons were charged with having firearms in their possession contrary to the Explosive Substances Act, 1883, and the Firearms Act, 1920, and the Lord Advocate stated to the Court that the liberation would constitute a serious risk to the public safety, the Court refused to grant bail.[1] No fees are exigible from, nor can expenses be awarded against, an accused in respect of an application for bail; [2] but in the event of the appeal by the prosecutor being refused, the Court may award expenses against the appellant.[3]

537. When the prosecutor appeals, the accused, if the bail fixed shall have been found by him, is liberated after seventy-two hours, or ninety-six hours if in any island in the Outer Hebrides or in the Orkney and Shetland Islands, from the time of his application being granted, unless his further detention pending consideration of the appeal be ordered by the High Court. Notice to the gaoler by telegraph from the clerk of Court or the Crown Agent is sufficient to justify detention until the arrival of such order in due course of post. In computing such period of hours, Sundays, public fasts, and public holidays are not included.[4]

538. An application for bail should be in writing [5] and should be signed by the accused himself or his agent. If it is not in writing, it cannot be founded on in after proceedings.[6] If the judge to whom the application is made was not the judge committer, it is necessary to produce along with the application a copy of the warrant of commitment. Under the Justiciary Court (Scotland) Act, 1868,[7] all bail bonds must specify the domicile at which the accused may be cited for trial.[7] On a question arising as to the sufficiency of the cautioner in the bond, the magistrate is not answerable for any delay which may occur, unless it be undue.

539. In the case of a peer, it is provided by the Trial of Peers (Scotland) Act, 1825,[8] that he shall be entitled to apply to the Lords Commissioners of Justiciary, or to the Sheriff within whose county such peer may be incarcerated, to be admitted to bail, and that the caution to be found shall be to appear and answer to any indictment for the crime or offence charged in any Court competent to try the said crime, including therein the High Court of Parliament and the Court of the Lord High Steward, within twelve months if before the High Court of Parliament or Court of the Lord High Steward, and six months if before any Court in Scotland.

540. The amount of bail is now matter for the discretion of the

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[1] *Mackintosh* v. *M'Glinchy*, 1921, J.C. 75; see also *Wilson* v. *M'Guire*, 1889, 2 White 267.
[2] 51 & 52 Vict. c. 36, s. 6.
[3] *Ibid.*; *Procurator-Fiscal of Dumfries*, 11th June 1892 (unreported).
[4] 51 & 52 Vict. c. 36, s. 7.
[5] *Andrew* v. *Murdoch*, 20th June 1806, F.C.
[6] *Arbuckle* v. *Taylor*, 1815, 3 Dow 160.
[7] 31 & 32 Vict. c. 95, s. 18.
[8] 6 Geo. IV. c. 66; see s. 8.

magistrate granting it, or of the High Court on appeal, and it is so dependent on all the circumstances of the particular case that little useful guidance would be furnished by citation of decisions. The general principle deducible is that bail ought to be of sufficient amount to be a reasonable deterrent against the accused absconding, and, on the other hand, consistently with this, the amount should not be fixed so high as to be in effect prohibitive for the particular accused. The fact that bail is sought in respect of a charge which is a later one of a series of successive charges is a relevant factor in arriving at the amount, as well as one affecting the propriety of granting bail.[1] It has been questioned whether when a person liberated on bail has been imprisoned again on a second charge for the same bailable offence in the same course of dealing, additional bail can be demanded.[2]

Subsection (4).—*Liberation during Trial.*

541. By the Act of 1701, a person in custody "in order to trial" was entitled to demand to be admitted to bail, but his right to do so ceased when his trial commenced.[3] In one case, after the diet had been called, but before the pannel was remitted to an assize, the Court certified the case to the High Court and ordered the pannel to be detained in custody. He applied to the Sheriff-Substitute to be liberated on bail. The application was granted, there being no opposition on the part of the prosecutor.[4] Liberation on caution has been granted by the Court even after the verdict of the jury had been returned, in consequence of a certification to the whole Court. This, however, was not, properly speaking, bail, as the liberation granted was from custody after a verdict, and not "in order to trial." The right to demand liberation on bail, as we have seen, no longer exists, and it is now in the discretion of the Court to grant or refuse bail, but the Court has never exercised its discretion in admitting a pannel to bail after his trial has commenced, without the consent of the public prosecutor. The usual procedure now is, in trials lasting more than one day, and where the accused has, prior to the commencement of the trial, been liberated on bail, for the Crown counsel to consent to his remaining at liberty between the continued diets,[5] if this course is considered to be warranted in the particular circumstances.

Subsection (5).—*Obligation and Discharge of Cautioner.*

542. The Criminal Procedure (Scotland) Act, 1887,[6] provides (as before mentioned) that the accused person, when brought before a

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[1] *Fraser*, 1893, 31 S.L.R. 58; *Peters* v. *Macdonald*, 1893, 1 Adam 72; 20 R. (J.) 78.
[2] *Anderson* v. *H.M. Advocate*, 1879, 4 Coup. 310; 7 R. (J.) 8.
[3] *H.M. Advocate* v. *Waddell*, Glasgow Autumn Circuit, 1808.
[4] *H.M. Advocate* v. *J. G. Fleming*, Dundee Circuit, January 1895.
[5] *H.M. Advocate* v. *City of Glasgow Bank Directors*, 1879, 4 Coup. 161; *H.M. Advocate* v. *John Paterson*, H.C., Edinburgh, 19th May 1890; *H.M. Advocate* v. *William Stewart and Anr.*, H.C., Edinburgh, 13th February 1894.
[6] 30 & 31 Vict. c. 35.

magistrate for examination on declaration, shall be entitled to apply for liberation on bail, and when admitted to bail the cautioner must bind and oblige himself, "in common form," that the accused shall appear at any diet to which he may be cited for further examination, or in order to answer any indictment or complaint which may be served upon him.[1] The cautioner, under the Bail Act of 1888,[2] for a person committed until liberation in due course of law, is bound to ensure the appearance of such person to answer at all diets to which he may be cited on the charge, that is, at all diets to which he may be cited prior to, and including, the diet of trial. It is to be noted, however, that in recent practice a clause has been introduced into the bail bond binding the cautioner that he shall present the accused at all diets of Court and until the final issue of any action, process, or criminal prosecution. It is doubtful, however, whether the cautioner is bound to accept a bail bond in these terms, and whether it is enforceable even if he does accept, looking to the terms of the Criminal Procedure Act of 1887 and the Bail Act of 1888. It would rather appear that, if the cautioner offered to bind himself that the accused should appear at any diet to which he may be cited and answer any indictment or complaint which may be served upon him, the accused would be entitled to demand liberation.

543. By the words "in common form," in s. 18 of the 1887 Act, the period of the cautioner's liability in cases of liberation under that section is limited to the then statutory period of six months (1701 Act); but the Bail Act of 1888, while repealing the Act of 1701, does not provide a limitation of the period for which the cautioner may be bound. In practice, however, the cautioner is taken bound for six months. Under the Trial of Peers (Scotland) Act, 1825,[3] the cautioner's obligation is limited to twelve months if the accused is called on to answer the charge in Parliament or in the Court of the High Steward, and to six months if in a Scottish Court. In all cases, however, the cautioner's obligation is discharged as soon as the accused has surrendered himself at the Bar of the Court and the trial has commenced. In the High Court of Justiciary, if, from any cause, the diet is continued after the jury have been charged with consideration of the case, and the pannel is liberated, this is done, not in reliance on the bail bond, but by special arrangement with Crown counsel; and the same applies, *mutatis mutandis*, to a trial on indictment before a jury in a Sheriff Court.

Section 9.—Procedure after Commitment with View to Trial.

544. After a person suspected of a crime has been committed until liberated in due course of law, the Procurator-Fiscal goes on to complete his precognition, making such further inquiry, if any, as he may find necessary. On the precognition being completed, the Fiscal reports it to the Crown Agent in Edinburgh, in order that the instructions of

[1] 30 & 31 Vict. c. 35, s. 18. [2] 31 & 32 Vict. c. 36. [3] 6 Geo. IV. c. 66, s. 8.

Crown counsel may be taken as to the disposal of the case. If, on consideration, Crown counsel, who are vested with the authority of the Lord Advocate, are satisfied that there is no ground for proceedings against the party committed, they mark the papers to this effect and order liberation, whereupon the accused person is at once set at liberty. This does not prejudice proceedings being renewed against him should further evidence appearing at a later stage render these proper. If, on the other hand, the case is to go to trial, an order is made by Crown counsel as to the mode in which it is to be tried. If it appears to counsel not to be a serious case it may be ordered to be tried summarily before a Sheriff (see *s.v.* SUMMARY PROCEDURE).[1] But if the case be too serious to be thus dealt with, an order is made for trial either before the High Court of Justiciary or before the Sheriff and a jury. There is a third form of procedure which seems to be still competent, though in practice never resorted to, viz. to try the accused "solemnly" before the Sheriff without a jury.[2]

545. Where a case is ordered to be tried by Sheriff and jury the conduct of the prosecution remains in the hands of the local Procurator-Fiscal, by whom the trial is usually carried through, although in a heavy case the Sheriff Court Depute of the Lord Advocate frequently takes over the conduct of the trial. Where the trial is appointed to take place before the High Court of Justiciary, whether on circuit or at a sitting in Edinburgh, the responsibility for the proceedings is assumed by Crown counsel and the active supervision of the preparations is in his hands, the Procurator-Fiscal acting under his directions where necessary in the work of preparation. Otherwise the steps antecedent to trial are substantially the same in either case, until the libel is called in Court for the first diet.[2] Where the trial is to proceed before a Sheriff and jury it takes place in the Court of a Sheriff having jurisdiction in the particular case according to the rules to be immediately noticed. In case of the accused being amenable in the particular matter to the jurisdiction of two or more Sheriffs, Crown counsel may direct before which the case is to be brought. Where the trial is to proceed in the High Court, it may be taken either at a Circuit Court or at a sitting in Edinburgh according to circumstances.[3] In whatever Court the trial is to be, the procedure leading up to the trial in a prosecution for the public interest is initiated in the same way, viz. by preparation and service on the accused of an indictment.[4]

SECTION 10.—COURTS HAVING JURISDICTION TO TRY CRIMES IN SCOTLAND.

SUBSECTION (1).—*General.*

546. The general principles of jurisdiction of the Courts of a particular country in regard to crime are elsewhere discussed—see JURISDICTION.

[1] Part V., *infra*.
[2] Moncrieff, Review in Criminal Cases, chap. i.
[3] See JUSTICIARY, HIGH COURT OF.
[4] See para. 555, *infra*.

But it is desirable to set out succinctly some of the leading rules by which the authorities are guided in deciding whether a particular charge can be tried by a Scottish Court, and, if it can be so tried, in allocating it to the High Court of Justiciary or a Sheriff Court with a jury. Before which of these tribunals a case is taken generally depends upon its seriousness, either because of the gravity of the offence itself or by reason of the aggravation of it by circumstances—generally by previous convictions. As a Sheriff is not empowered to impose a sentence of penal servitude, and as the highest sentence of imprisonment which he can normally impose is one for two years, it is customary that any case in which, in the opinion of the prosecutor, the sentence merited may exceed this term of imprisonment should be indicted to the High Court of Justiciary. To the jurisdiction of one or other of these Courts every person charged with crime committed in Scotland against the law of Scotland is amenable—saving only Peers who, for petty treason, murder, or other felony, are amenable only to their own order, and who therefore for these crimes may, if they so choose, claim to be tried by their Peers at Westminster. Lord Justice-Clerk Macdonald states this exception as only applying to Scottish Peers;[1] but as the constitutional law of Scotland is now that of the United Kingdom there seems no reason to doubt that all who under that law are Peers of the Realm, whether of England, Scotland, Ireland, or Great Britain, would, in respect of crimes committed in Scotland, be entitled to the like privilege.

Subsection (2).—*High Court.*

547. As regards subject-matter, the High Court has jurisdiction in all cases of crime committed in Scotland, and in many cases where a crime has been committed partly in Scotland and partly elsewhere. In regard to the latter class, the test seems to be whether the main act or a previous act forming a substantial and important element in a continuous crime has been committed in Scotland. If it has, there will be jurisdiction in the High Court.[2] And it appears that there would be jurisdiction even if no overt act were done in Scotland, if an act had been done out of Scotland which takes practical effect in Scotland. Such would be the case, *e.g.*, of one forwarding a package containing an explosive to Scotland so arranged that upon being opened on delivery there the package might explode: or the forwarding of a poisonous substance by post to Scotland with the intention that it should be there partaken of; or the firing from, say, a place in England of a bullet which took effect across the Scottish border. The extension of jurisdiction is specially important in the case of such crimes as theft and reset which are continuous crimes and which are triable in the Courts of the jurisdiction in which the party accused is apprehended. This is recognised as competent at common law and is confirmed by

[1] Macdonald, p. 247.
[2] For particular instances see cases noted in Macdonald, p. 248.

statutory enactments. But it appears that apart from special statutory provision an offender charged in a jurisdiction in which the later part of the crime was effected is not liable to be put on trial for an aggravation of it depending on an act committed in the other jurisdiction, such as violence or breaking into premises in order to secure the property, the possession of which in the jurisdiction within which he is caught warrants him being put on trial there for theft or reset. Under the Coinage Acts [1] and the Post Office Acts [2] provision is made giving concurrent jurisdiction to the Courts of different localities in which either a single offence or two offences, the second of which implies an aggravated punishment, have been committed.[3]

548. In cases other than those noticed, except in that of treason, the Scottish Courts cannot, except under special statutory authority, deal with offences committed on land outwith the boundaries of Scotland. As regards offences at sea, the Courts of Scotland have power to try piracy irrespective of the nationality of the offender, or of the ship, or the position of the latter. Jurisdiction in cases of other crimes depends upon the nationality of the ship or upon its position at the time. In the case of offences on the High Seas, or in foreign ports or harbours, the Courts of Scotland have not jurisdiction unless the vessel be a British ship; and where the offence is committed in a foreign port or harbour, it is also necessary that the offender should be a British subject. For the principal statutory regulations at present affecting this matter, see the Merchant Shipping Act, 1894.[4] The Scottish Courts have jurisdiction to try coinage offences committed at sea in ships which are registered at or which touch at any Scottish port.[5]

549. The jurisdiction of the High Court extends to the trial and punishment of all acts which are plainly criminal, although previously unknown and not dealt with by any statute.[6]

550. The High Court is the only Court competent to try cases of murder, rape, deforcement of messengers, breach of duty by magistrates, or corrupt disclosure of official secrets. Also in all cases in which a higher punishment than imprisonment is by statute directed to be pronounced, its jurisdiction is exclusive, unless in so far as the necessity for imposing such higher punishment may be affected by the terms of ss. 43 and 77 (4) of the Summary Jurisdiction Act of 1908,[7] the former of which sections (applied to trials on indictment by the latter) gives power to reduce the sentence of imprisonment provided by statute. But it is a question which has not been sharply decided whether a Sheriff has jurisdiction (unless under express statutory power) to try an offence which by statute is punishable at the discretion of the judge either by imprisonment or by a higher punishment, even if the demand

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[1] 24 & 25 Vict. c. 99, s. 28.
[2] 7 Will. IV. & 1 Vict. c. 36, s. 37.
[3] See for more full detail Macdonald, p. 248 *et seq.*
[4] 57 & 58 Vict. c. 60, ss. 684–687.
[5] 24 & 25 Vict. c. 99, s. 36.
[6] Hume, i. 12; Macdonald, p. 252, and cases cited there, note 2.
[7] 8 Edw. VII. c. 65.

for punishment be limited to such a sentence as a Sheriff could competently pronounce.[1] Since 1887 the limitation of crime for which a capital sentence may be pronounced to murder and offences under the Act 10 Geo. IV. c. 38 has ceased to make the possibility of this sentence a bar to the jurisdiction of the Sheriff Court in the case of charges of other crimes,[2] and by the 1887 Act express provision is made that it shall be lawful to indict in the Sheriff Court persons accused of the crimes of uttering a forged document, or of robbery, or of wilful fire-raising, or of any of the crimes under Acts of Parliament for the prevention of persons going armed by night for the destruction of game, which prior to the passing of that Act could be indicted only in the High Court of Justiciary.

551. In the High Court one judge can try any case; but in difficult and important cases two or more may sit. Where points of difficulty arise either as to relevancy, or as to the effect of verdicts or the proper sentences to be pronounced, it has hitherto been not unusual to certify the case for the opinion of the whole Court, in which event three judges or any larger number sit to dispose of the matter. It may be surmised that the opportunity now existing under the Criminal Appeal (Scotland) Act, 1926,[3] for such points (where decided adversely to the accused) being brought under review by appeal will probably diminish the number of instances of certification to a full Bench. When the High Court is sitting to consider a case which has been reserved, the presiding judge has no vote unless where the other judges are equally divided in opinion.[4] This is probably a relic of the time when the Lord Justice-General need not be a lawyer, but was often a lay nobleman. The limitation does not apply when the Court is sitting to hear criminal appeals under the recent Act. The Bench must then consist of an uneven number of judges, and all vote.[5]

Subsection (3).—*Sheriff Court* (*Solemn Procedure*).

552. As regards subject-matter, Sheriffs can try all crimes which infer only an arbitrary punishment, and which are not restricted by statute to any other *forum*. For the statutory jurisdiction conferred by the Criminal Procedure Act, 1887,[2] in regard to certain crimes which were formerly cognoscible only by the High Court, see the preceding paragraph; and also as to offences under which by statute a particular punishment in excess of what a Sheriff has power to award is prescribed or authorised. Although sentence of infamy may competently be pronounced for a crime in addition to the ordinary pains, this does not exclude a Sheriff from trying it.[6]

553. Territorially, the jurisdiction of Sheriffs and their substitutes is limited to offences committed within their counties except as regards continuous crimes and crimes in respect of which the Sheriff of the place

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[1] Macdonald, p. 258.
[2] Criminal Procedure Act, 1887, s. 56.
[3] 16 & 17 Geo. V. c. 15.
[4] See Macdonald, p. 253, note 3.
[5] 16 & 17 Geo. V. c. 15, s. 12 (1).
[6] Macdonald, p. 258.

of apprehension has jurisdiction by statute. If for "country" be substituted "county" the rules discussed above [1] as to crimes committed partly in one jurisdiction and partly in another, or crime following on crime in several jurisdictions, are applicable to cases to be tried in the Sheriff Court so as to give jurisdiction to the Sheriff of the county selected by the Lord Advocate, and this to the effect of enabling him to pronounce sentence although the conviction may be only of that part of what is charged which took place in a county outside of his district.[2] The jurisdiction of a Sheriff and his substitutes includes "the navigable rivers, ports, harbours, creeks, shores, and anchoring grounds" in and adjoining the sheriffdom, and where counties are separated by a river, or firth, or estuary, the Sheriffs of the adjoining counties have a cumulative jurisdiction over the intervening space.[3] The bounds of such overlapping jurisdictions in different Sheriff Courts in these and other similar cases are now defined with considerable precision in the Summary Procedure Act of 1908.[4]

554. The Sheriffs hold Courts for jury trial at the principal towns of their shires, or at any district town at which such trials are appointed to be held. Where two or more counties are combined into one sheriffdom, the Sheriff may try any case at a Court town of the sheriffdom, although committed in another county of the sheriffdom from that in which the trial is held.[5]

Section 11.—Indictment.

555. When Crown counsel have decided that a case is to go forward to trial, and the particular Court before which it is to be tried has been determined, the next step is to prepare the indictment. This is the written instrument which is delivered to the accused containing the particulars of the charge of which he is accused.[6] Prior to the Criminal Procedure Act, 1887, prosecution by indictment was confined to the High Court of Justiciary, in which however, in certain circumstances, prosecution by Criminal Letters [7] was also competent. Baron Hume writes: "By custom the process of indictment is the exclusive privilege of the Lord Advocate or public prosecutor who alone is possessed of that notorious and public character which entitles him, summarily and of his own authority, to state himself to the Court as an accuser, and call on the judges for trial of his charge without any previous license obtained." [8] Hence in the Sheriff and Jury Court prosecution was, prior to 1887, in practice uniformly by criminal letters or libel alone. This was altered by s. 2 of the Act of 1887, which provides that "All prosecutions for the public interest before the High Court of Justiciary

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[1] See para. 548, *supra*.
[2] Criminal Procedure Act, 1887, s. 22.
[3] 11 Geo. IV. & 1 Will. IV. c. 69, ss. 22, 24; *Lewis* v. *Blair*, 1858, 3 Irv. 16.
[4] 8 Edw. VII. c. 65, s. 10.
[5] Macdonald, p. 257, and cases there cited.
[6] Alison, ii. 211; Criminal Procedure Act, 1887, s. 2.
[7] See paras. 564 and 565, *infra*.
[8] Hume, ii. 155.

and before the Sheriff Court where the Sheriff is sitting with a jury shall proceed on indictment in name of His Majesty's Advocate, and in all cases in which by the existing law and practice such prosecutions proceed on criminal letters indictment shall be used instead thereof." Criminal letters therefore now survive as a form of procedure only in the comparatively rare cases in which a prosecution in solemn form is carried through at the instance of a private prosecutor.[1] An indictment in the Sheriff Court by a private prosecutor for his private interest is incompetent even with the concurrence of the Lord Advocate:[2] and it is questionable whether such proceedings by way of indictment are competent in any Court even with this concurrence.[2]

556. Before the 1887 Act, the indictment was a document of much formality, bristling with words of style, and a brief description of it cannot be better given than in the words of Baron Hume:[3] "The manner and form of setting forth the criminal accusation in the indictment and in criminal letters is quite the same, and has long been settled in our practice, viz. a syllogistic form wherein the major or leading proposition (known as the 'major premiss') states the appellation of the crime meant to be charged, or, if it have no proper name, describes it at large, and characterises it as a crime that is severely punishable; the minor proposition ('minor premiss') avers the pannel's guilt of this crime, and supports this averment with a narrative of the fact complained of; and the conclusion infers that, on conviction by the verdict of an assize, he ought to be punished with the pains by law attached to his transgression." He adds: "As in this form the whole charge coheres with a dependency of each member on the others, so any omission or inaccuracy which breaks the texture of the syllogism and hinders the connection of sense, or even of language, shall, in strictness, vitiate the libel. No matter though it be evident what the words to be supplied are, and that they are words of form only, and that the error has been owing to a hasty transcription of the libel: It is not decent that the face of a criminal record should be slurred with those lame and disjointed accusations, and no allowance can be had of such slovenly blunders in the preparing of this sort of business." This form of indictment was a source of much trouble and anxiety to those on whom the duty of drawing and revising indictments devolved, as the smallest error in form, logical or otherwise, and even a misspelling, was enough to throw out an indictment. The Criminal Procedure Act of 1887 was therefore hailed with general approval, since it abolished the syllogistic form of indictment, and dispensed with all merely formal words and words of style, and gave authority for indictments being framed in plain and simple words, expressing the act charged as criminal. The parts of that Act which refer chiefly to the form are sections 2, and 4 to 15 inclusive, and Schedule A gives specimens. Though the formal

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[1] Para. 564, *infra*.

[2] *Dunbar* v. *Johnston*, 1904, 4 Adam 505; 7 F. (J.) 40.

[3] Hume, ii. 155.

words referred to in those sections are not put in the indictment, they are now to be read into it as if they were there.[1]

557. The indictment, as now regulated by that Act, may be written or printed, or partly both,[2] and contains the following particulars, viz.:—

1. The accused's name and address. If in custody, he is designed as "prisoner in the prison of "; but if on bail, he should be named and designed as in his declaration (s. 4).

2. The instance. The indictment proceeds, "you are indicted at the instance of" (here the name of the Lord Advocate is inserted, followed by the words) "His Majesty's Advocate, and the charge against you is." The instance does not now fall though there be a change of Lord Advocate (s. 3).[3] An indictment raised after the Lord Advocate has been raised to, and has taken his seat on, the Bench, and before the appointment of his successor, rightly proceeds in the name of the Solicitor-General, and may be signed by a Procurator-Fiscal "by authority of the Solicitor-General." Moreover, the fact that that Solicitor-General has been raised to the Bench prior to the conclusion of the case does not cause the indictment to lapse.[4]

3. The time when the act complained of was committed. The prosecutor must libel the exact date when the act was committed, but the latitude of three months usually allowed him is still implied although not stated (s. 10). This latitude, however, is only available provided the exact date is not of the essence of the charge; and if the accused pleads an *alibi* on the date charged, the *alibi*, if proved, will usually free him from the charge. There are cases, however, which, from their nature or circumstances, necessitate the charging of the full latitude of three months, and sometimes a much longer period, *e.g.* (1) where an accused has been in a position of trust and had opportunities of appropriating goods or money without immediate detection; and (2) cases of reset where the property appropriated is not recovered till long after the theft or robbery. In the case of *H.M. Advocate* v. *Charles Macdonald* [5]—a charge of reset—a latitude of fifteen months was taken. See also the case of *H.M. Advocate* v. *Macleods*—fraud [6]—as an example of time charged under the statute and at common law. But in the case of *H.M. Advocate* v. *M'Kenzie* [7] the opinion was expressed by Lord Justice-Clerk Macdonald that when an exceptional latitude of time is taken, it is proper that the prosecutor should set out in the indictment (as he would certainly be required to prove) the nature of the special circumstances relied on as justifying the exceptional latitude taken. In that case the latitude proposed extended over nearly six years.

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[1] See 1887 Act, s. 8; and *H.M. Advocate* v. *Jas. Swan*, 1888, 2 White 137; 16 R. (J.) 34; *H.M. Advocate* v. *M'Leod*, 1888, 2 White 9; *Stuart* v. *Clarkson*, 1894, 1 Adam 466; 22 R. (J.) 5; and *Gallagher* v. *Paton*, 1909, 6 Adam 62; 1909 S.C. (J.) 50.

[2] Sect. 21.

[3] See *Halliday* v. *Wilson*, 1891, 3 White 38; 19 R. (J.) 3.

[4] *Solicitor-General* v. *Levalle*, 1914 S.C. (J.) 15; 7 Adam 255.

[5] 1888, 1 White 593; 15 R. (J.) 47.

[6] 1888, 2 White 71; 16 R. (J.) 1.

[7] 1913, S.C. (J.) 107; 7 Adam 189.

And if in any case the indictment be so framed that it is not reasonably possible for the accused, looking to the indictment, to know what latitude of three months the Crown proposes to take, this will be fatal to the relevancy of the indictment.[1]

4. The place where the act was done. If in a house, or on a stair, or on a street, this should be stated, the house being specified by the occupier's name. A minute description is not required; the words "in or near," or similar words formerly used, need not be stated, but are implied (s. 10).

5. The description of the act done (the *modus*). "It is a sacred rule of law," said Lord Alemore, "that the facts must be laid with precision in a criminal charge." [2] Forms of indictment are given in Schedule A to the Criminal Procedure Act, and many more may be usefully referred to in Macdonald's manual or key to that Act. The additional forms given in Schedule C of the Summary Jurisdiction Act, 1908,[3] although not in terms made applicable to procedure by indictment, may usefully be consulted in so far as they deal with charges which are of such a nature that they may be so tried. From these examples and from the views of the judges in the case of *Bewglass* v. *Blair*,[4] it will be gathered that minute specification is not now required.

6. Where the accused has been previously convicted, a statement is included to that effect. This statement should agree with the crime or crimes in the extract and any schedule thereto.

558. Appended to the indictment is (1) a list of productions, which in general consist of the accused's declaration (if any), a medical report, extract convictions, and any documents or articles intended to be produced at trial. These should be enumerated briefly. (2) A list of witnesses for the prosecution. These should be numbered consecutively, and the names of each given in full, with their last-known address. In practice this is now done by giving the name of the house or number of the street where the witness lives.

559. The indictment must be signed by the Lord Advocate or one of his deputes, or by the Procurator-Fiscal, the words "By authority of His Majesty's Advocate" being put before the signature of the Procurator-Fiscal. In practice, the advocates-depute only sign the indictments for the High Court, and the Procurator-Fiscal those for the Sheriff and Jury Court; but the 1887 Act seems to sanction any deletion or correction on the record copy of the indictment made before service being authenticated by the initials of anyone who could have signed the same; that is, a Procurator-Fiscal may authenticate by initials a deletion or alteration made on an indictment signed by an advocate-depute (ss. 2 and 21). The inventory and list must each be signed by the person signing the indictment.

560. Sec. 23 of the Act provides for warrants being obtained for

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[1] *Creighton* v. *H.M. Advocate*, 1904, 4 Adam 356; 6 F. (J.) 72.
[2] See Alison, ii. 298.
[3] 8 Edw. VII. c. 65.
[4] 1888, 1 White 574; 15 R. (J.) 45.

citation of the accused for trial. The indictment may be served upon an accused by any macer, messenger-at-arms, sheriff-officer, or officer of police at any place; but where the accused is in prison, it shall be served by any governor, deputy governor, or warder of that prison (s. 24); and the notice shall call upon the accused to appear before the Sheriff Court which is nearest to the prison in which he is confined, or, if on bail, to the Court nearest to the domicile fixed in his bail bond; and the notice shall call upon the accused to appear at two diets, the first not less than six clear days after service, and the second not less than nine clear days after such first diet (s. 26).

561. Mention may be made of the leading particulars in which the 1887 Act has, with reference to indictments, simplified procedure. The descriptions of persons, things, quantities, etc., are not required in detail (ss. 11 to 15). It is not necessary to quote the words of a statute contravened, but sufficient to refer to the section of it (s. 9). Robbery, theft, fraud, and embezzlement are now treated generically as dishonest appropriation of property; and under an indictment charging robbery, theft, embezzlement, or fraud, an accused may be convicted of reset; under an indictment of robbery, embezzlement, or fraud, he may be convicted of theft; under one for theft, he may be convicted of embezzlement, or fraud, or of theft, though the circumstances proved may in law amount to robbery (s. 59). This provision was no doubt intended to prevent any miscarriage of justice, and should not be taken to sanction careless drafting of an indictment. Under an indictment such as those just mentioned, a verdict of resetting property appropriated by any of the modes mentioned can also be obtained, and it is not necessary to specify the particular mode by which the resetted property was appropriated (s. 58). Extract convictions are not now laid before the jury, unless where under the law formerly existing it would have been competent to lead evidence of such previous convictions as evidence *in causa* in support of the substantive charge, or when an accused attempts to set up good character (s. 67), or, in charges of reset, where, under the Prevention of Crimes Act, 1871, they may be used as evidence of guilty knowledge.[1] Where an accused pleads not guilty, any convictions in the list of productions are held to apply to him, unless he gives notice of objection to them five days before trial; and where an accused intimates his intention to plead guilty to the charge under s. 31,[2] he must give notice of objection to convictions two days before the diet (s. 66).

562. It may be noted here that under the special provision which the 1887 Act contains for the speedy trial of accused who intimate through an agent their intention to plead guilty, and desire to have their cases early disposed of,[2] the indictment is in the ordinary form, but no list of witnesses is required, and the only necessary productions are

[1] 34 & 35 Vict. c. 112, s. 19; and *Watson* v. *H.M. Advocate*, 1894, 1 Adam 355; 21 R (J.) 26.

[2] See para. 566, *infra*.

extract convictions. The *inducice* of service in these cases is four clear days. The principal indictment and extract convictions in ordinary trials require to be lodged with the sheriff-clerk of the district where the first diet is to be held, on or before the day of service (s. 27). No objection to the validity of citation upon an accused on the ground of discrepancy between the record copy and the service copy because of any error or deficiency in such copy is competent unless stated *in limine* at the first diet; and unless the Sheriff thinks any such objection tends to prejudice the accused, it shall not entitle the accused to object to plead (s. 33).

563. Objections to the relevancy of indictments, formerly of frequent occurrence, are now comparatively rarely taken; indeed, from the simplicity of the present form, there is little opportunity for objections. Formerly, when an objection taken to an indictment was likely to be sustained, an amendment might be made by the deletion of certain words: but the Court would not sanction an amendment if the nature of the charge was thereby altered. It was formerly a general principle that nothing could be added to an indictment. But the Procedure Act made an important innovation, by providing that any discrepancy or variance between the indictment and the evidence may be rectified by amendment of the indictment at any time before the case for the prosecution is closed, provided the accused be not prejudiced thereby (s. 70). And by the Summary Jurisdiction Act, 1908,[1] this power of amendment has been rendered even more elastic, it being provided, by a section which is made applicable to procedure on indictment (s. 30), that it shall be competent at any time prior to the determination of the case, unless the Court see just cause to the contrary, to amend the complaint by deletion, alteration, or addition, so as to cure any error or defect therein, or to meet any objections thereto, or to cure any discrepancy or variance between the complaint and the evidence; provided that such amendment shall not change the character of the offence charged, and provided further that, if the Court shall be of opinion that the accused may by such amendment be in any way prejudiced in his defence on the merits of the case, the Court shall grant such remedy to the accused by adjournment or otherwise as to the Court may seem just.[1] Any amendment may be authenticated by the clerk of Court.[2]

Section 12.—Criminal Letters.

564. A second form of initiating solemn criminal proceedings long co-existed with that by indictment, viz. by Criminal Letters. To the limited extent to which this form can now be used, it is not a rival to indictment, the spheres of the two being quite distinct. Prior to 1887 public prosecutions in solemn form in the Sheriff Courts were usually initiated by criminal letters; and although procedure by indictment had

[1] 8 Edw. VII. c. 65, s. 30; cf. *John Coffey* v. *H.M. Advocate*, Ct. Cr. App., 28th February 1928.

[2] 1887 Act, s. 70; and 8 Edw. VII. c. 65, s. 30.

long been the normal mode of proceeding in the High Court, it was competent to the Lord Advocate to use criminal letters where he found it convenient to do so; and in certain circumstances (which need not be detailed) it was necessary for him to do so. The use of criminal letters as a step in prosecutions in the public interest was completely done away with by the Criminal Procedure Act of 1887 (ss. 2 and 43). But criminal letters continue to be, as in the past, the competent, and indeed the only competent, form of initiating a prosecution for crime before the High Court of Justiciary at the instance of a private prosecutor.

565. Criminal letters differ essentially from indictments in their characteristics. Indictments—which directly charge the accused with the crime libelled—can be used only by one invested by the Sovereign with the authority of public prosecutor, while acting in that capacity.[1] In procedure by way of criminal letters, on the other hand, access to the Court is first sought by the intending prosecutor, by an application made by a bill addressed to the High Court for such letters, which, when granted, pass under the signet of the High Court. Upon the application, a deliverance is granted by the Clerk of Justiciary (formerly, before 1848, by one of the judges) to a certain day in the form: "*Fiat ut petitur* (the person complained upon) to the day of next, ilk assizer and witness under the pain of 100 merks Scots." The *fiat* serves as the prosecutor's warrant for raising criminal letters and for having them passed under the signet of the Court. The letters begin with an address in the Sovereign's name to macers, messenger-at-arms, etc. They proceed to set out in syllogistic form the crime charged, etc., very much as in the old form of indictment; and they conclude with the Sovereign's will for summoning accused, witnesses, and assizers. It is, in general, necessary that the bill should have the concourse of the Lord Advocate before the *fiat* is granted. If it does not bear to have this, and his concurrence does not appear to have been asked, the Court will not proceed to consider the bill.[2] But if the Lord Advocate's concurrence, having been asked, has been refused, the Court may on consideration of the circumstances, if it see fit, either order the Lord Advocate to grant it, or allow the complainer to proceed without this concurrence.[3] In the most recent case, that of *J. & P. Coats, Ltd.* v. *Brown*,[3] the latter course was followed by a majority, after a hearing by a full Bench. But in face of a considered declinature by the Lord Advocate to concur, it is only in very extreme cases and on good cause shewn that the Court will regard itself as justified in interfering to sanction either course.[4] In the case of *J. & P. Coats*, cited, letters were

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[1] See Hume, ii. 155.

[2] *Robertson* v. *H.M. Advocate*, 1892, 3 White 230.

[3] See *Mackintosh* v. *H.M. Advocate*, 1872, 2 Coup. 236; *Robertson* v. *H.M. Advocate*, 1887, 1 White 468; 15 R. (J.) 1; *Mackintosh* v. *H.M. Advocate*, 1873, 2 Coup. 367; *J. & P. Coats, Ltd.* v. *Brown*, 1909 S.C. (J.) 29; 6 Adam 19.

[4] See cases of *Mackintosh* v. *H.M. Advocate*, 1872 and 1873, *supra*; and *Robertson* v. *H.M. Advocate*, *supra*.

granted at the instance of a private prosecutor, and followed out to trial, the charge being one of falsehood, fraud, and wilful imposition which the Lord Advocate had refused to prosecute on the ground of the improbability, in his judgment, of securing a conviction. A conviction was in the end obtained by the private prosecutor.

Section 13.—Acceleration of Trials.

Subsection (1).—*Where Accused desires to Plead Guilty.*

566. Where a person who has been committed until liberated in due course of law recognises his guilt of the crime with which he is charged and desires to accelerate the proceedings, if he shall give written notice to the Crown Agent through his own procurator that he desires to have his case at once disposed of and declares his intention to plead guilty, it shall be lawful to serve him with an indictment in form of Schedule L of the Criminal Procedure Act, 1887, citing him to appear at a diet, not less than four days after the notice, before the Sheriff before whom, in usual course, he would have appeared at the first diet if he had been served with an indictment for trial in the ordinary way. It is not necessary to lodge or give notice of any list of witnesses or productions other than productions to prove previous convictions (s. 31). At the appointed diet, the Sheriff, if any plea of guilty be tendered which shall be accepted by the Procurator-Fiscal, shall deal with the case as cases are required to be dealt with where an accused person pleads guilty at a first diet. If the case is one suitable for such punishment as the Sheriff can inflict, he may at once pronounce sentence. But if the case is either one which on account of the nature of the charge can only be tried in the High Court, or is of such an aggravated nature that the Sheriff shall hold that the amount of punishment should be disposed of by the High Court, then after the plea is signed by the accused and the Sheriff, the latter makes a remit to the High Court for sentence. This remit is sufficient warrant to bring the accused person without further notice before the High Court for sentence at any sitting at any time when it may be convenient, and the original warrant remains in force until the case is so brought before the High Court for sentence. If, on the case being called before the Sheriff, the accused should plead not guilty to the charge, or if he plead guilty to a part thereof only, and the Fiscal does not accept the plea as restricted, the diet is deserted *pro loco et tempore*; and in that event the subsequent procedure against the accused person follows the normal course just as if he had not attempted to avail himself of the special procedure for being brought to trial on short *inducice* (s. 31). It is essential in order to a valid remit that the plea of guilty taken should be authenticated by the Sheriff appending his signature to the plea recorded (which should also be signed by the person pleading, if he can write) (ss. 29 and 31) ;[1] and

[1] *H.M. Advocate* v. *Galloway*, 1894, 1 Adam 375; *H.M. Advocate* v. *M'Donald*, 1896, 3 S.L.T. 317.

the plea and authentication of this particular remit must be written upon the record copy of the indictment—it not being sufficient that this is done upon a duplicate.

567. A plea of guilty thus given by an accused person after service of an indictment following upon notice of intention to plead guilty cannot, as a rule, be withdrawn by him—the provisions of the Act of 1887 empowering the Court to permit withdrawal not being applicable to such case.[1] The plea may indeed be withdrawn if the libel be withdrawn by the Crown.[2] But the general rule is that a plea under s. 31 of the Act of 1887 is treated as an offer by the accused which, being acted upon by the Lord Advocate, the accused is not entitled to withdraw from—unless, indeed, in very exceptional circumstances. Where there is anything of the nature of misunderstanding or oppression, the Crown, if allowed to desert the diet *pro loco et tempore*, would probably not insist on an objection to the withdrawal of the plea. The same rule holds where a plea given includes an admission of habitual criminality under the Prevention of Crime Act, 1908. But it is the duty of the Sheriff before taking the plea to a charge of being an habitual criminal to explain clearly to the accused the nature of the charge and the consequence of the admission.[3] The Crown is not debarred, by the service of an indictment under s. 31 of the Act of 1887 and a plea and remit following thereupon, from withdrawing the particular charge and deserting the diet before sentence has been moved for in the High Court, and thereupon proceeding to serve a new indictment upon a charge arising out of the same facts.[4]

SUBSECTION (2).—*Where Accused desires to be brought to Trial.*

568. Our law has always been jealous to protect the citizen against the risk of being detained in custody on a criminal charge without being promptly brought to trial. Apart from the protection afforded by requiring from the Sheriffs attending at the Circuit Courts a return of untried prisoners confined within their jurisdictions[5] by which the attention of the judges may be called to any cases of remarkable delay, facilities have long existed to enable the accused person himself to force on his trial. These for nearly two centuries took the form provided in the Act of William III. passed in 1701, entitled, "An Act for preventing wrongous imprisonment and against undue delay in Tryals," popularly known as "running his letters." This is still available in charges of treason. But in so far as relates to all other trials, the provisions in regard to delay contained in this old Act were repealed by the Criminal Procedure Act, 1887,[6] and simplified provisions were substituted.

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[1] *H.M. Advocate* v. *Lyon*, 1887, 1 White 538; 15 R. (J.) 66.
[2] *H.M. Advocate* v. *Black*, 1894, 1 Adam 312.
[3] *Paul* v. *H.M. Advocate*, 1914 S.C. (J.) 69; 7 Adam 343.
[4] *Pattison* v. *Stevenson*, 1903, 4 Adam 124; 5 F. (J.) 43.
[5] 9 Geo. IV. c. 29, s. 24.
[6] 50 & 51 Vict. c. 35, s. 43.

569. Under s. 43 of that Act (1) any prisoner in prison under a commitment until liberated in due course of law, who is not served with an indictment within sixty days of his commitment, is entitled to give notice to the Lord Advocate through the Crown Agent that if he is not served with an indictment within fourteen days from the date of such notice, the prosecutor will be called on to shew cause to the High Court why the accused person should not be released from prison. (2) Upon a note being presented to the Court setting forth that such notice has been given and that no indictment has been served within the fourteen days, the Court shall appoint the prosecutor forthwith to shew cause, and where this is not done to the satisfaction of the Court, it shall grant warrant ordering the release of the accused at the expiry of three days from the issuing of the order, unless within that time an indictment shall have been served on him. (3) Where one accused has been so liberated, the prosecutor may still competently raise an indictment against him and obtain from the judge of the Court of the second diet specified therein, or from a judge of the High Court, a warrant for apprehension and recommitment to prison of the accused, to await his trial on such indictment. If the trial on the indictment do not take place at the second diet named therein or at a proper adjournment thereof, the High Court shall on an application by note by or on behalf of the accused person, after hearing parties, consider the whole circumstances. The Court may either order the immediate release of the prisoner, or it may order him to be released on a day specified unless before that day he shall have been remitted to the knowledge of an assize on indictment; or it may refuse to make any order. But where a person has been incarcerated for eighty days, then (4) if an indictment is served upon him and he is detained in custody after the expiry of the eighty days, unless he is brought to trial and the trial concluded within one hundred and ten days from his commitment, he shall be forthwith set at liberty and declared for ever free from all question or process for the crime for which he was charged. (5) Further, where any person accused has been liberated after having been committed until liberated in due course of law, he shall not be detained in prison more than one hundred and ten days in all; but unless the trial is brought to a conclusion before the expiry of the hundred and tenth day of confinement subsequent to commitment the same result shall follow. But (6) in any case under the section, it shall be competent to the High Court upon it being shewn to the satisfaction of the Court that the trial ought to be suffered to proceed after the lapse of the hundred and ten days as aforesaid, when the delay in prosecuting to verdict is owing to illness of the accused, or the absence or illness of a necessary witness, or the illness of a judge or juror, or other sufficient cause for which the prosecutor is not responsible, to order the person accused, notwithstanding the expiry of the said period, to be kept in custody with a view to trial for such further period or periods as to the Court shall seem just.

570. The scope of this section was the subject of careful considera-

tion by a full Bench of the High Court in the case of *H.M. Advocate* v. *Bickerstaff*,[1] in which a person accused of murder, having been found insane at the time of the first trial, and having been ordered to be detained in common form, had recovered his sanity and was again charged with the same crime. He having been already incarcerated for more than 110 days in all, a motion was made in bar of trial founding on s. 43 of the Act of 1887. The Crown maintained that the Court could still competently grant an extension of the time for trial notwithstanding that the motion was made after the expiry of the period. The Court held it competent to entertain the application, and on consideration held that it was entitled to order the accused to be detained for a further period with a view to trial, and that in the circumstances the case was one for the exercise of this discretionary power. *In dubio*, however, "the flavour of constitutional right which still adheres to the topic" (of the right to personal liberty) "should influence the Court to construe the statutory provisions . . . benignly," and in favour of liberty rather than against it. But whether either the necessity or the opportunity of applying a general consideration of that kind does or does not occur, must of course depend on the particular circumstances and character of the question raised.[2]

Section 14.—Service of Libel and First Diet.

Subsection (1).—*Service and Calling of Diet.*

571. The indictment is served upon the accused person as described above by delivery to him of a service copy along with a notification citing him to appear at two diets of compearance, the first of which is always in a Sheriff Court, and the second of which may be either (*a*) in the same or a different Sheriff Court, or (*b*) in the High Court. The first diet must be not less than six clear days after service of the indictment, and the second diet not less than nine clear days after the first diet (s. 26). The notice for the first diet calls on the accused to appear in the Sheriff Court which is nearest the prison in which he is confined (whether that prison is within the jurisdiction of the particular Court or not), or, if he is liberated on bail, in the Sheriff Court of the district in which his domicile for citation is fixed in the bail bond, or in any other case before a Sheriff within whose jurisdiction the crime is alleged to have been in whole or in part committed.

572. In the case of a person who has absconded, citation may be made at the last known residence.[3] Along with the indictment (and generally included in the same print) there is served a list of the witnesses proposed to be called, and also a list of productions to be made by the Crown. On or before the date of service there shall be lodged with the sheriff-clerk of the Court of the first diet the record copy of the

[1] 1926, J.C. 65; and see also *H.M. Advocate* v. *Macaulay*, 1892, 3 White 131.
[2] *H.M. Advocate* v. *Bickerstaff*, *supra*, per Lord Justice-General Clyde at p. 72.
[3] 1887, Act, s. 26.

indictment and any extract convictions which are to be produced (s. 27), and a copy of the list of witnesses and of the list of productions must also be lodged with the sheriff-clerk of the sheriffdom of the Court of the second diet. In cases where the accused is to be proceeded against for fugitation, a list shall be lodged in the Justiciary Office.

573. On the calling of the case at the first diet the accused is called upon to plead to the charge contained in the indictment. But before doing so, he has the opportunity of tendering any plea in bar of trial (*i.e.* a plea which, if sustained, would prevent the charge proceeding further), or to the relevancy of the particular indictment. This is the proper stage at which to take any such pleas. "Objections to the relevancy of indictments" (and the same is true of a plea in bar) "must be taken at the first diet and cannot be stated afterwards, but the Court is entitled to interfere should it appear that gross injustice will be done by refusing to hear an objection to relevancy at the second diet which has not been stated at the first." [1] Of course a plea founded on insanity at the time of the trial may always be stated at the second diet if the insanity has only manifested itself after the first diet.

Subsection (2).—*Pleas in Bar.*

574. Of these, the principal are:—

(1) *Non-Age.*—If the offender be a pupil child, *i.e.* under seven years of age, he is *doli incapax* and so cannot be prosecuted for crime.

(2) *Insanity at the Time of Trial.*—Such insanity, if established to the extent of the accused being unable rationally to plead or instruct his defence, is an effectual bar to the trial proceeding upon the indictment, whether insanity at the time of the alleged offence be alleged or not. If the plea be sustained, the Court will order the accused to be confined during His Majesty's pleasure. The plea may be stated either on behalf of the accused or of the prosecutor. It must be supported by proof in the form of medical evidence of the existence of the requisite degree of insanity. Any inquiry necessary may be taken by the Court without empanelling a jury, and this is the usual practice. It is competent for the Sheriff to reserve this and other preliminary objections which he does not regard as frivolous for consideration of the High Court where the second diet is in that Court.[2]

(3) *Want of Jurisdiction in the Court.*—This can seldom now arise.

(4) *Res judicata.*—This may be, in its simple form, founded upon a previous judgment holding a libel in the same form as the indictment and upon the same facts to be irrelevant. Thus, it is incompetent to try a man before the Sheriff upon a libel which the Sheriff-Substitute has found to be irrelevant;[3] but the accused person may be brought

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[1] Per Lord Justice-Clerk Macdonald in *H.M. Advocate* v. *Bell*, 1892, 3 White 313; see also *Lloyd* v. *H.M. Advocate*, 1899, 2 Adam 637; 1 F. (J.) 31; *H.M. Advocate* v. *Brown*, 1907 S.C. (J.) 67; 5 Adam 312.

[2] *H.M. Advocate* v. *Brown*, *supra*.

[3] *Longmuir* v. *Baxter*, 1858, 3 Irv. 287.

to trial in the High Court on a libel which has been held irrelevant by a Sheriff.[1] The most common form, however, in which a plea of *res judicata* presents itself is in the plea of "tholed an assize," *i.e.* that the accused has already undergone trial on the same charge. The former trial must have been for exactly the same crime, and it must have been regularly conducted. If the second trial is for what is really another crime, though it appears to be connected with the offence originally charged, the plea of "tholed an assize" is invalid.[2] The prosecutor, however, cannot evade the plea by merely describing the same facts by a different name. Trial, however, under one section of an Act does not debar trial under another section. If new events supervene after the first trial which change the nature of the offence, the plea of *res judicata* is invalid. Thus, a man previously tried for assault may, on the death of his victim from the effects of the assault, be tried for culpable homicide or murder.[3] If the former trial was stopped by circumstances for which the prosecutor was not responsible, such as the illness of the judge, the accused, a juror, or an essential witness, the assize will not have been tholed.[4] The point of time at which the assize begins to be tholed is when the jury is sworn.

(5) *Indemnity from Crown.*—If a *socius criminis* has once been called by the public prosecutor as a witness and examined, he cannot be prosecuted for the offence in reference to which he depones, the measure of his indemnity being the libel in support of which his evidence is called. It is usual to require the judge to caution the witness and to inform him that what he says cannot be used against him. It seems to have been doubted [5] whether indemnity would result in the absence of warning and agreement between the prosecutor and the witness; but the trend of recent authority supports the view that if the prosecutor puts such a witness in the box and examines him, he is thereby precluded from prosecuting him in respect of the crime covered by the libel. It is, however, generally expedient that this should be made known to the witness so that he may speak with freedom.[6] There was indeed some authority for stating that the promise of exoneration must have been given by the Lord Advocate or by one of his recognised deputes—the Solicitor-General or an advocate-depute. An unauthorised promise of indemnity by an inferior official was formerly held to be no safeguard to a person relying on the promise.[7] But according to more recent practice it would seem that the fact of a *socius* having been adduced as a witness by one prosecuting for the Crown is in itself enough to discharge him from liability to prosecution.[6] To

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[1] *Fleming*, 1866, 5 Irv. 289.
[2] *Galloway* v. *Somerville*, 1863, 4 Irv. 444; *Glen* v. *Colquhoun*, 1865, 5 Irv. 203.
[3] *Cobb or Fairweather*, 1836, 1 Swin. 227, 354; *H.M. Advocate* v. *P. O'Connor*, 1882, 5 Coup. 206.
[4] Hume, ii. 469; Alison, ii. 618; and *cf.* 1887 Act, s. 43.
[5] Macdonald, pp. 433, 434.
[6] *Macmillan* v. *Murray*, 1920, J.C. 13.
[7] *Miller & Brown*, 1850, J. Shaw 288.

secure immunity from prosecution, the witness must actually give evidence either on precognition or at the trial.

575. When a plea in bar of trial is sustained, the accused is entitled, except in the case of insanity, to be discharged from the bar.[1]

Subsection (3).—*Pleas to Relevancy.*

576. Any plea to relevancy should also be stated before the accused has pled to the libel. As the success of a plea to relevancy does not involve immunity from liability to future prosecution upon a relevant libel the prosecutor may move for leave to desert the diet *pro loco et tempore*: and if this be allowed the accused may be subsequently tried on a new indictment, the original warrant of commitment still holding good. If the libel appear to the Court to be objectionable, it is open to it to take judicial notice of its deficiency. Objections to relevancy may now be met by amendment, the greater latitude for which allowed by the Summary Jurisdiction Act of 1908 [2] has been already noticed.[3] If the second diet be indicted for the Sheriff Court it is open to the Sheriff at the Court of the first diet to dispose of these preliminary pleas, either by way of sustaining or repelling them.

Subsection (4).—*Plea of Pannel.*

577. If no plea be sustained which stops further procedure, the accused is called upon to plead to the charge. If a plea of guilty be tendered (in full, or, if accepted by the prosecutor, in part) the Sheriff may adjourn the case to another sitting to consider the sentence whether the second diet is appointed for his Court or not (1887 Act, ss. 28, 34). If this be done, the accused remains in custody under the existing warrant, unless consent is given by the Lord Advocate to his being at large, such consent being subject to any conditions as to bail fixed by him; but no unreasonable delay must take place between the plea and the diet for sentence (s. 34). The plea of guilty must be signed by the accused person, if he can write, and by the Sheriff (s. 28). In case any other plea than one of guilty in whole, or in part if accepted by the prosecutor, be given, then if the second diet be for a different Court, any interlocutor disposing of the preliminary plea, the plea tendered, and any interlocutor adjourning the case are written on the record and are also recorded in the books of Court, and the record copy of indictment and extract convictions relative thereto are transmitted to the sheriff-clerk within whose district is the Court of the second diet. In the case of a plea of guilty, the same course may be followed if the Sheriff, either on the representation of the agent for the accused or otherwise, considers that it is expedient in the circumstances

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[1] Macdonald, p. 431 *et seq.*; Anderson, Criminal Law, p. 233.
[2] Sec. 30, applied to proceedings on indictment by s. 77 (4).
[3] See para. 563, *supra*.

that the sentence should be determined by the Sheriff of the Court of the second diet (s. 28).

578. It should be noticed that if an accused person be not legally represented, the services of one of the agents (and, if necessary, of counsel) for the poor will be afforded him, and as matter of course the Sheriff presiding will see that he is made aware that he can have the opportunity of being so advised.

Subsection (5).—*Special Defence.*

579. Where it is intended that the accused's plea of "Not Guilty" should be supported by a "special defence," notice of this must be given at the first diet unless good cause is shewn afterwards for not having done so; and in any case such notice must be lodged not later than two days before the second diet (s. 36). Examples of special defences are: (1) *alibi*, *i.e.* a statement that the accused was not at the place of the offence when it was committed, but was at a different place, which must be specified; (2) insanity at the time of the act or any other exceptional mental or physical state which would afford a defence to or would mitigate the gravity of the charge; (3) an allegation that the offence was committed by some other person particularly named and designed; and (4) an allegation of self-defence. Notice is not necessary where all that it is intended to prove is mental weakness, not amounting to irresponsibility, which is advanced merely in mitigation of the gravity of the offence. On the other hand there are certain lines of conduct in regard to matters which do not actually amount to a special defence which a defender will not be allowed to pursue unless he gives notice of his intention to do so. Such, for example, are an attack upon character, honesty, or chastity of a woman witness, or proof that the injured party was of a quarrelsome nature; and in leading evidence upon these matters the pannel will be strictly held to his notice.

Subsection (6).—*Procedure where Second Diet is in High Court.*

580. The procedure at the first diet, subject to one or two important and necessary differences, follows substantially the same order as is above described in regard to a case, the trial of which is to proceed in the Sheriff Court. But the immediate conduct of the prosecution is in the hands of Crown counsel, and while the Sheriff may overrule any objection to relevancy which appears to him to be frivolous, if he should hold that there is any substantial discrepancy, etc., in the indictment which is liable to prejudice the accused or that any other preliminary objection, whether well-founded or not, is at all events not frivolous, he does not dispose of the objection, but reserves the same for the consideration of the High Court without calling on the accused to plead. Moreover, even if the accused plead guilty, the Sheriff cannot himself

proceed to sentence. This plea having been signed by the accused, the Sheriff appends his signature to the plea recorded, and the clerk of Court transmits the record copy, etc., to the Clerk of Justiciary at once. The same procedure is followed if the plea be "not guilty," save that in this case it does not require to be authenticated by the signature of the accused (s. 29).

581. The 1887 Act provided machinery whereby when a person accused cited to the High Court for the second diet has pleaded guilty at the first diet, any Lord Commissioner of Justiciary, in Chambers and without the presence of the prosecutor or person accused, may adjourn the second diet to any other sitting of the High Court of Justiciary, thus rendering it unnecessary to hold the sitting originally fixed for the trial of that particular case. (s. 49) This power has recently been extended to cover the case of a person who has pleaded "not guilty" at the first diet, but who has thereafter at any time before the second diet given written notice to the Crown Agent through his own procurator that he intends to plead guilty to the charge in whole or in part and the Lord Advocate intimates to the Clerk of Justiciary that he is prepared to accept such plea.[1]

Section 15.—Lodging Productions; Notice of Defence Witnesses; Diligence to cite Witnesses.

582. When a case is to go to trial, all articles of the production of which notice has been given by the prosecution must be lodged in the office of the sheriff-clerk of the district of the second diet in Circuit or Sheriff Court cases, and with the Clerk of Justiciary where the trial is to be before the High Court in Edinburgh, and that "in due time." And if the accused has been admitted to bail, the bail bond or a certified copy should be produced. The test of "due time" seems to be the absence of prejudice to the accused; but as regards the Sheriff Court the day before the second diet is fixed by Act of Adjournal [2] as the latest period for lodging. It is not necessary that every article should actually be placed in the possession of the clerk. It is enough that they are where they may be under his control, and where parties may have an opportunity of inspection, and assurance that the articles will not be tampered with.[3]

583. If the accused propose to adduce witnesses not on the Crown list or to put in evidence any productions not included in the Crown list, he must, not later than three clear days before the jury is sworn to try the case against him, send to the Procurator-Fiscal of the district of the second diet, or to the Crown Agent in the case of a High Court trial, notice of the names and designations of such witnesses, and of such productions. If such notice be not given, the accused will not be allowed to examine the witnesses or put the productions in evidence

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[1] 15 & 16 Geo. V. c. 80, s. 2 (1). [2] 17th May 1827. [3] Macdonald, pp. 422, 423.

unless he shall shew before the jury that he was unable to give the full three days' notice. When this is done, the Court shall grant to the prosecutor such remedy by way of adjournment or otherwise as shall seem just.[1] The accused may on application to the Sheriff or to the Court of Justiciary, as the case may be, obtain any necessary warrant for the citation of witnesses whom he may require to have cited; and in like manner he may obtain diligence for recovery of any productions necessary to enable him to maintain his case.

584. The notice required to admit of a special defence has already been dealt with in the preceding section. Written notice of any objection to be taken to the validity or admissibility of any extract of a previous conviction of crime intended to be used by way of aggravation by the prosecutor must be given to the Procurator-Fiscal or the Crown Agent, as above, five clear days before the second diet (or if the accused intends to plead guilty at the first diet to the charge without the aggravation, two clear days before that diet).[2] So, too, if any objection is to be taken by the accused founded on the fact that he is not able to find any person mentioned in the indictment or list of witnesses, notice must similarly be given at least four clear days before the second diet.[3] Copies of the notices of special defences, witnesses, and productions, for the use of the Court must be lodged with the sheriff-clerk of the district of the second diet, or in cases for the High Court at Edinburgh, with the Clerk of Justiciary.

585. If, say, in consequence of notice given by the accused of a special defence, or of witnesses or productions notified for the defence, the prosecutor shall desire to call any witnesses or make any productions not already included on his list, he may be allowed by the Court to adduce this evidence provided that written notice, containing in the case of a witness his name and address, shall have been given to the accused not less than two clear days before the jury is sworn to try the case. This provision, introduced by the Criminal Procedure (Scotland) Act, 1921,[4] somewhat alleviates the disadvantage under which the prosecutor lies in not being allowed to lead proof in replication.

Section 16.—Second Diet.

Subsection (1).—*Diet is Peremptory.*

586. At the "second diet" the trial proceeds in ordinary form. If it is in a different Court from that of the first diet, the clerk enters in the books of Court or in a separate record a transcript of the first diet proceedings from the record copy of the indictment.[5] "Diet" is the technical term for the date and hour for which the accused is cited to appear in Court for trial. A criminal diet is peremptory, and cannot even of consent of parties be called on a day earlier than that appointed

[1] 1887 Act, s. 36; cf. *Hugh M'Lure*, 1848, Ark. 448.
[2] 1887 Act, s. 66.
[3] *Ibid.*, s. 53.
[4] 11 & 12 Geo. V. c. 50, s. 1.
[5] 1887 Act, s. 40.

in the citation.[1] If the diet be not called on that day, whether the original day or an adjourned date (as to which see *infra*), the instance, *i.e.* the particular libel, falls.[1] But the right of prosecution is not thereby lost, it "may still be used in the raising of a new process on the same grounds and to the same effect."[2] But in the case of *Tabram*[2] it was questioned whether if a diet be once called, and the prosecutor decline to proceed with the charge, and the Court refuse to desert the diet otherwise than *simpliciter*, it is competent for the prosecutor to proceed upon a new libel for the same offence.

Subsection (2).—*Calling of Diet.*

587. The proceedings commence by the calling of the diet by the macer of Court. The trial must normally take place with open doors, it being illegal to exclude the public from a criminal trial except in the case of indecent and unnatural offences, or where the Court has been cleared in consequence of disorderly conduct or intimidation,[3] or possibly in an exceptional case where the Court is satisfied that the public interest requires the exclusion of the public. Where the ground of exclusion is the character of the offence or evidence, the doors should be opened before the jury return their verdict. At the calling the accused, if present, is placed in the dock. He is thereafter technically described as the "pannel" or "panel."[4] But though commonly, this term is not invariably used in modern practice. And it is noteworthy that it is not once found in the Act of 1887, in which the words "person accused" are used throughout the statute; and in Macdonald's Criminal Law the term "prisoner" is generally employed.

588. If on the calling either the accused or the prosecutor fail to appear, the trial cannot proceed in his absence. "It is a well-established rule of criminal law," observed Lord Justice-Clerk Macdonald, "that no proceedings can take place in the absence of the prosecutor or of the accused;"[5] and "if a diet is called and the prisoner is not present, nothing can be done except that in the High Court, if the prisoner does not appear, he may be fugitated and his bail bond may be forfeited."[6] (In the Sheriff Court fugitation is not competent, but the bail bond may be forfeited.) But this seems to suffer exception to the extent of allowing an objection to citation to be pleaded by the procurator of the accused, for which, however, a mandate is required if the accused has left the kingdom except for a temporary purpose.[7] The rule does not apply to proceedings on appeal under the Criminal Appeal Act, 1926.[8] And if the prosecutor, though not personally present, accounts

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[1] Hume, ii. 263; Alison, ii. 343.
[2] *Ibid.*, and see *H.M. Advocate* v. *Tabram*, 1872, 2 Coup. 259.
[3] Act 1693, c. 27; and see Macdonald, p. 426, and cases there cited.
[4] Hume, ii. 265, note 4; Act of Adjournal, 18th November 1695.
[5] In *Walker* v. *Emslie*, 1899, 3 Adam 102; 2 F. (J.) 18.
[6] *Kelly* v. *Rowan*, 1897, 2 Adam 357; 25 R. (J.) 3, per Lord Justice-Clerk Macdonald.
[7] Macdonald, p. 430.
[8] 16 & 17 Geo. V. c. 15, s. 7.

for his absence by deputy (which the Lord Advocate may do), the Court may, if satisfied, adjourn the diet, or, if not satisfied, desert it.

Subsection (3).—*Adjournment of Diet.*

589. A diet may be adjourned, the adjournment being necessarily to a specified date.[1] Except in cases in which an adjournment is prescribed by statute, adjournment is in the discretion of the Court. The cases afford examples of various reasons advanced for adjournment. Complication of the case or a long list of witnesses have been held not to be a sufficient reason.[2] Adjournment is not given because a person mentioned in the indictment or in the list of witnesses cannot be found, unless the requisite four days' notice has been given to the prosecutor and sufficient information has still not been supplied.[3] But absence of a material witness,[4] or discovery of important evidence, or opportunity desired for the inspection of a production has been held a good ground for adjournment.[5] But delay will not be given by reason of the absence of a witness if no effort has been made to secure his attendance.[6] And it is not a sufficient ground for delay that a witness has refused to be precognosced.[7]

590. Formerly it was only with reluctance that the Court adjourned before completion even of a very long trial.[8] But now by statute a trial may be adjourned from day to day, or the Court may adjourn over a day or days.[9] While a proper adjournment must be to a day fixed, and resumption of the proceedings must be properly minuted and the re-calling of the diet recorded, the absence of this was held not to vitiate the proceedings in the case of a short adjournment obviously for a luncheon interval, from 1.25 p.m. to 2.15 p.m., although no record had been made of the re-assembling of the Court, except in the words "evidence for the Crown resumed." [10] But in practice it is not usual to record the short cessation of proceedings for such a purpose; and in the case cited this was approved as the proper practice.[10]

Subsection (4).—*Disposal of Preliminary Objections.*

591. When a case has been called, if no motion is made for adjournment, or if such a motion having been made is refused, the next step varies according as the second diet is in a Sheriff Court or in the High Court. If it is in a Sheriff Court no plea in bar or to relevancy may be stated at the second diet, except in a case where the plea is in respect of circumstances which have occurred since the first diet, or where the

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[1] *Anderson and Fraser*, 1852, 1 Irv. 1; *Robertson* v. *Duke of Atholl*, 1869, 1 Coup. 348; *Anderson* v. *Allan*, 1868, 1 Coup. 4.

[2] *H.M. Advocate* v. *Rodger*, 1868, 1 Coup. 76.

[3] 1887 Act, s. 53.

[4] *Niven*, 1858, 3 Irv. 204; *H.M. Advocate* v. *Thomson*, 1871, 2 Coup. 103.

[5] Hume, ii. 388; *Dempster*, 1862, 4 Irv. 143.

[6] *Stewart*, 1837, 1 Swin. 540; see also *Hendry* v. *Brims*, 1889, 2 White 380.

[7] *Fletcher*, 1847, Ark. 232.

[8] Hume, ii. 414–417, 417, note 1.

[9] 1887 Act, s. 55.

[10] *Tocher* v. *H.M. Advocate*, 1927, J.C. 63.

plea has been reserved by the judge at that diet (1887 Act, ss. 28, 40). In the High Court, on the other hand, the proceedings at the first diet may always be reviewed (s. 41). Where the accused, cited to that Court for the second diet, has pleaded guilty to the charge or any part of it, if the Court is satisfied that the plea was taken to an irrelevant or incompetent charge or under substantial error or misconception, or in circumstances which tend to prejudice the accused, it may allow the plea to be withdrawn or modified, desertion of the diet or adjournment being allowed at the discretion of the Court to the prosecutor (s. 41). In that event, if no order has been made postponing the trial to another date, a prosecutor may, within nine days after the date of the diet, give notice to the accused to appear and answer to the indictment at another diet not sooner than nine clear days thereafter. Meantime the existing warrant for detention of the accused stands good (s. 42). Any objections which have been taken before the Sheriff to the citation, relevancy, or otherwise which have been reserved by him (*i.e.* practically all objections which are not frivolous) are heard and disposed of. The nature and effect of such objections have already been considered in dealing with the first diet.[1]

Subsection (5).—*Plea of Pannel.*

592. After these objections have been dealt with, it is usual for the clerk to mention the plea (if any) which has been recorded at the first diet. If this be "guilty" the judge proceeds to sentence. If it be "not guilty" the pannel is sometimes asked whether he adheres to his plea. But the more common, and it seems the better, practice is to assume that he does so unless the contrary be stated for him. Of course, if, because of reserved preliminary pleas, no plea to the charge has been taken at the first diet, the pannel is definitely asked to plead. After recording of the plea of "not guilty," there is still room for certain preliminary motions affecting the procedure.

Subsection (6).—*Motions for Separation of Trials or of Charges.*

593. Of these, the most common are those for separation of trials or separation of charges against the accused.

The former is directed against the accumulation of several prisoners charged in one indictment. Upon cause shewn, or if it appear to be oppressive to send all the accused to trial together, the Court may order them to be tried separately, but there must be some special ground made out for the separation.[2] Perhaps the most common ground for such a motion is the desire of one accused to have the benefit of the evidence of another charged along with him. This is a relevant,[3] but not

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[1] Para. 571, *supra*.

[2] *H.M. Advocate* v. *Turner*, 1881, 18 S.L.R. 491; see per Lord Justice-Clerk Moncreiff.

[3] *H.M. Advocate* v. *M'Ileer*, 1869, 1 Coup. 390; *Kerr* v. *Phyn*, 1893, 3 White 480; 20 R. (J.) 60; *H.M. Advocate* v. *Gollan*, 1875, 3 Coup. 82; *H.M. Advocate* v. *Drever*, 1885, 5 Coup. 680.

necessarily a sufficient, ground.[1] The test to be applied is in each case whether the separation appears to be necessary in the interests of justice.[2] The other motion for separation is for separation of charges where, in the same indictment, a number of charges are brought against the pannel of such kind that the evidence laid upon one may prejudice him in relation to another. This form of separation is less common than the other and the definition of the circumstances in which it will be granted is difficult. Again the test is what is "legitimate and fair to the accused."[3] Apart from separation of trials moved for by the pannel it occasionally happens that where a large number of persons are implicated in the same charge the Court may, for convenience, appoint them to be tried in batches.[4]

Subsection (7).—*Empanelling of Assize.*

594. Matters have now reached the stage at which the accused is remitted to an assize, *i.e.* sent to trial before the jury which is empanelled. In a criminal trial, five special and ten common jurors are balloted. If the accused be a landed man (*i.e.* a landed proprietor) he is entitled to have a majority of landed men on the jury.[5] Women are now eligible and liable to serve upon juries in the same way as men,[6] but provision is made for the judge either on motion of a party or at his own instance to order the jury to be composed of men only or of women only, or for exempting a woman from service by reason of the nature of the evidence to be given or of the issues to be tried, or on medical grounds. Rules applicable to these have been made by Acts of Adjournal.[7] After empanelling of the jury is the last point at which the diet may be deserted as matter of right by the prosecution.

595. When the jury has been empanelled the charge is read over to them by the clerk of Court. This generally follows the words of the indictment, using the third person instead of the second, and omitting any reference to previous convictions. But for convenience it has been made competent, where the indictment is lengthy or complicated, to read instead a summary of the charge approved by the judge.[8] Where this is done, it is usual to furnish the jurors with copies of the full indictment, omitting the reference to previous convictions and appended lists.[8] After the indictment or summary has been read the jury is

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[1] *Sangster* v. *H.M. Advocate*, 1896, 2 Adam 182; 24 R. (J.) 3; *Marr* v. *Midlothian Procurator-Fiscal*, 1881, 4 Coup. 407; 8 R. (J.) 21; *H.M. Advocate* v. *Parker and Barrie*, 1888, 2 White 79; 16 R. (J.) 5; *Collison* v. *Mitchell*, 1897, 2 Adam 277; 24 R. (J.) 52.

[2] See Macdonald, pp. 443–444, and cases there cited.

[3] *H.M. Advocate* v. *Bickerstaff*, 1926, J.C. 65, per Lord Justice-General Clyde at p. 75; and cf. *H.M. Advocate* v. *Gibson*, 1871, 2 Coup. 128; and *Coffey* v. *H.M. Advocate*, Ct. Cr. App., 28th February 1928.

[4] *H.M. Advocate* v. *Macleod and Ors.*, 1888, 1 White 554.

[5] Hume, ii. 311; Macdonald, p. 446; *Kennedy*, 1838, 2 Swin. 213.

[6] 9 & 10 Geo. V. c. 71, and Enrolment of Women (Scotland) Act, 1920, 10 & 11 Geo. V. c. 53.

[7] 6th December 1920 and 2nd February 1921.

[8] Circuit Courts, etc. (Scotland) Act, 1925, 15 & 16 Geo. IV. c. 81, s. 3.

sworn by the clerk, and thereafter no private communication may take place between them and any person, nor may they leave the Court during the course of the case except under charge of an officer, until they have delivered their verdict or been discharged by the Court. But a minor irregularity in this respect, which the Court is satisfied has not prejudiced the trial, will be disregarded. And where a trial lasts over one day it is not now necessary that the jury be secluded between the sittings of the Court except in a case where a capital sentence is involved, or when the Court specially directs seclusion, which it has power to do.[1] In those exceptional cases, where the trial is prolonged over more than one day, provision is made for the jury being accommodated over night at an hotel, under the charge of the officials, in whose presence communications on matters of business may be made.

596. If at an early stage of the trial a juror is taken ill, it is competent with consent of the accused to substitute another juror and reswear the whole jury, the witnesses deponing again to the truth of the record of what has been taken down as their evidence.[2] It is incompetent, however, even with consent, to proceed with the trial before the remaining members of the jury.[3] If the jury, though consisting of the proper number, be not balloted in the due proportions of five special to ten common jurors, it is competent for the pannel to object to the last-called juror of the wrong class before the jury is sworn; but if he neglects to do so at the proper time, he cannot afterwards challenge a verdict arrived at by the jury as constituted.[4] If both prosecutor and accused consent, a jury which has been balloted for a previous case may be taken to try another case,[5] and this is frequently done.

Section 17.—Desertion of the Diet.

Subsection (1).—*General.*

597. This signifies the judicial abandonment of proceedings on the particular libel on which the accused has been brought into Court. It does not involve abandonment of the charge against the accused—the surrender of the right to prosecute him for the particular crime—but only the withdrawal of the particular libel. Where the diet is deserted *pro loco et tempore* or where it is postponed or adjourned it is no longer necessary to obtain a new warrant for the incarceration of the accused; the old warrant continues in force.[6]

Subsection (2).—*Desertion* pro loco et tempore.

598. The prosecutor, if not prepared to proceed to trial may move the Court to desert the diet *pro loco et tempore.* Although, in the

[1] 1887 Act, s. 55.
[2] *H.M. Advocate* v. *Lundie*, 1868, 1 Coup. 86.
[3] *Laird and Hosie* v. *H.M. Advocate*, 1922, J.C. 17.
[4] Jurors (Scotland) Act, 1825 (6 Geo. IV. c. 22), ss. 16 & 17; and *Torri* v. *H.M. Advocate*, 1923, J.C. 52.
[5] 6 Geo. IV. c. 22, s. 18.
[6] 1887 Act, s. 52; and see *supra*, para. 527.

absence of statutory provision to the contrary, this is a matter entirely in the discretion of the Court,[1] the motion is usually granted as a matter of course; but if it be opposed, it may be refused if the granting of it would involve injustice to the accused.[2] In dealing with the preliminary procedure at the first and second diets a number of instances have been noticed in which this motion would appropriately be made and would normally be granted. The prosecutor is not obliged to specify his reasons for making the motion, as it might be contrary to the public interest to do so.[3] If the motion be granted the prosecutor may subsequently serve a fresh libel for the same offence;[4] or he may, if he prefers, avail himself of the special machinery provided by the Act of 1887.[5] It is competent to desert the diet *pro loco et tempore* even after the jury are balloted for, but before they are sworn. Until the jury are sworn the prisoner is not in their hands, and it is quite competent to desert the diet.[6]

SUBSECTION (3).—*Desertion* simpliciter.

599. This may take place either (*a*) on the motion of the prosecutor, or (*b*) *ex proprio motu* of the Court. If the prosecutor move a desertion *simpliciter* he cannot prosecute again for the same offence.[7] If, however, the Court *ex proprio motu* desert *simpliciter*, this does not necessarily prevent a new libel for the same offence.[8] Alison says that such desertion by the Court (if on account of some irregularity in the citation or of some error in the libel or lists) "determines the fate of that particular process only, and cannot preclude the raising of a new libel in a more improved form."[9] The prosecutor may move for desertion of the diet *simpliciter*, even after a verdict of "guilty" has been returned by the jury; the effect of which is to free the accused from punishment, to entitle him to be discharged from the bar, and to exclude all subsequent proceedings against him for the same offence.[10]

SECTION 18.—PROCEEDINGS BEFORE THE ASSIZE.

SUBSECTION (1).—*Leading of Evidence for Prosecution.*

600. When the jury has been sworn, the prosecutor proceeds to lead the evidence on which he relies to support the charge. If there be a special defence, this is, however, first read to the jury by the clerk.[11] It was formerly in the discretion of the Court whether the evidence should be recorded in shorthand or not. Until recent times the pre-

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[1] *Archibald*, 1768, cited by Hume, ii. 276.
[2] *M'Atamney*, 1867, 5 Irv. 363.
[3] *Macphie*, 1763, cited by Burnet, Criminal Law, 310, n.; Alison, ii. 356.
[4] Alison, ii. 355; *Collins* v. *Lang*, 1887, 1 White 482; 15 R. (J.) 7.
[5] 1887 Act, s. 42; and cf. *Wood* v. *H.M. Advocate*, 1899, 3 Adam 64; 2 F. (J.) 6.
[6] *Martin*, 1858, 3 Irv. 177.
[7] Hume, ii. 277; and case of *Leslie*, 1788, cited there; Alison ii. 357; Macdonald, p. 442; *H.M. Advocate* v. *Hall*, 1881, 4 Coup. 500; 8 R. (J.) 52.
[8] *H.M. Advocate* v. *Tabram*, 1872, 2 Coup. 259.
[9] Alison, ii. 357; *Buchanan*, 1727, Hume, ii. 277.
[10] See authorities cited in note 7, *supra*.
[11] Macdonald, p. 448.

ponderance of practice was against this being done except in specially lengthy or serious cases, the judge in other cases relying on his own notes. But under the Criminal Appeal Act, 1926,[1] it is now necessary to have shorthand notes of the "proceedings" (which includes the evidence) taken at all trials in which appeal under that Act is competent. As this includes all trials on indictment before the High Court or a Sheriff, it is thus now imperative to have a shorthand record of the evidence.

601. Exposition of the general principles of evidence is beyond the scope of this article (see EVIDENCE); but there are certain technical rules governing the competency or manner of adducing proof in criminal cases which it is proper to notice shortly. It is a fundamental principle of Scottish criminal practice that all the evidence must be led in presence of the Court, the accused, and the assize.[2] Hence the Court of Justiciary will not grant a commission to examine a witness abroad with a view to his deposition being read to the jury at the trial.[3] The rule suffers an apparent exception in the case of the dying deposition of a person whose death is proved to have occurred before the trial. But this is rather apparent than real. The fact of the deposition having been made is proved to the jury by a person present at the emission of it (generally a magistrate attesting it), who can speak to the fact that what is in the written papers was the testimony of the deponent; and the law does not regard this testimony as within the rule excluding hearsay, so, *quantum valeat*, it goes before the assize.[4]

602. The rule is that a witness must be sworn or affirm. But children under twelve are not sworn; the judge, after satisfying himself that the child understands the obligation to speak the truth, warns him to do so. In the case of children between twelve and fourteen years of age, the judge uses his discretion whether to follow the same course or to administer the oath.[5]

603. Witnesses ought not to be present in Court during the examination of other witnesses, before they have themselves given their evidence.[6] But the fact that a witness has been so present does not render his evidence incompetent, though it may affect its value.[7] Medical and scientific witnesses are generally allowed to be present in Court during proof of facts, retiring, unless otherwise agreed upon, during the evidence on the matters of opinion in regard to which they are to testify.[8] But in a case of objection taken, the Court has refused to allow a medical witness to be present prior to his own examination.[9]

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[1] 16 & 17 Geo. V. c. 15, s. 11 (1).

[2] See Hume, ii. 404, 405; Alison, ii. 548; Act, 1567, c. 91; *H.M. Advocate* v. *Hunter*, 1905, 4 Adam 523; 7 F. (J.) 73; *Aitken* v. *Wood*, 1921, J.C. 84.

[3] *H.M. Advocate* v. *Hunter*, *supra*.

[4] As to Dying Depositions, see Macdonald, pp. 480–492; and *H.M. Advocate* v. *Wards*, 1869, 3 Coup. 186; *H.M. Advocate* v. *Peterson*, 1874, 2 Coup. 557.

[5] *Anderson* v. *Macfarlane*, 1899, 2 Adam 644; 1 F. (J.) 36.

[6] *Docherty and Anr.* v. *M'Lennan*, 1912 S.C. (J.) 102, 6 Adam 700. [7] Macdonald, p. 458.

[8] *H.M. Advocate* v. *Laurie*, 1889, 2 White 326. [9] *Dingwall*, 1867, 5 Irv. 466.

604. A witness may competently be asked whether, upon a specified occasion, he made a statement differing from that made by him at the trial; and (subject to the rules as to the stage at which this is competent) [1] evidence may be adduced in the course of the trial to prove that the witness did make such different statement on the occasion specified.[2] But a witness is entitled to require that his signed precognition be destroyed before he is examined.[3] And any attempt to shew minor discrepancies between the evidence given on oath and a statement made on precognition, whether technically competent or not, is not encouraged, in view of the somewhat special circumstances under which statements on precognition are made.

605. Every article which is to be made part of a case must be included on the list either of the prosecutor or of the pannel; and must be identified and its connection with the case proved.[4] In criminal cases, the accused is himself, in effect, a production, and must be duly identified. Sometimes owing to lapse of time or failure of memory a witness is at the trial doubtful of the accused's identity. In this case it may be proved that at an earlier date he identified a person in custody, if it be sufficiently established *aliunde* that the accused is that person.[5] In a question as to the identity of an accused, who was absent, with a certain person named, it was held to be incompetent to prove a statement made to a third party by the latter, who could not be found,[6] in course of the trial of an alleged *socius criminis*. And in the same case, it was held to be incompetent to examine a witness as to the likeness of this party in a photograph which, not being in the list of productions, could not be produced.[7] Had the photograph been produced, the line of examination would probably have been held competent.[8] A person who cannot himself be a witness may be shewn to witnesses in order to be identified.[9] A person's statement that he had heard words spoken through the telephone and thought he recognised the voice has been admitted as competent evidence as to the identity of the person speaking through the telephone.[10] Productions are generally identified by the labels attached to them.[11] A witness who became blind before the trial was examined as to an article which he had identified when in possession of his sight.[12]

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[1] See paras. 608 and 612, *infra*.

[2] Evidence (Scotland) Act, 1852 (15 Vict. c. 57), s. 3.

[3] Dickson, ii. s. 1750; Macdonald, p. 462.

[4] Dickson, ii. s. 1823.

[5] *Wight*, 1836, 1 Swin. 47; Dickson, i. s. 263; ii. s. 1776; Macdonald, p. 486.

[6] *H.M. Advocate* v. *Monson*, 1893, 1 Adam 114, and see the case of *Burnet*, 1851, J. Shaw 497, therein commented on.

[7] *H.M. Advocate* v. *Monson*, *supra*.

[8] See the English case of *R.* v. *Tolson*, 1864, 4 F. & F. 103.

[9] *Lang and Mitchell*, 1817, cited Hume, ii. 349, n.; *Bryce*, 1844, 2 Broun 119; *Yates and Aur.*, 1851, J. Shaw 528. As to what notice is requisite and sufficient to permit of this, see Macdonald, p. 482; see also *Maclean*, 1836, 1 Swin. 278.

[10] *M'Giveran* v. *Auld*, 1894, 1 Adam 448; 21 R. (J.) 69.

[11] Dickson, ii. s. 1776; Macdonald, p. 486.

[12] *Taylor*, 1838, Bell's Notes, 246.

606. Under the Act of 1887 when in the trial of any indictment the evidence led shall be sufficient to prove the identity of any person, etc., it shall not be a valid objection to the sufficiency of such evidence that any particulars set forth in regard thereto in the indictment have not been proved.[1]

607. Evidence of the character of the accused person may be led with the object either of throwing light on the probability of his guilt or innocence, or as an element affecting punishment. It is only with the former use that we are now concerned. And similarly evidence of the character of a witness may in certain circumstances be relevant for consideration of the jury. It is hardly necessary to observe that evidence as to character can only have weight in doubtful cases. Where the proof is clear and unambiguous that a man has committed the crime, evidence of good character is useless *in causa*. If, however, the other proof is not conclusive one way or the other, or if where a series of facts are established or admitted and the only question remaining is the intent of the accused in acting in the way he did, then evidence as to character is of great importance. To be of any value, the evidence must be as to general character. Evidence that a man acted in a certain way on a particular occasion is valueless, for even the worst criminal might be able to prove that occasionally he acted as an honest man. The evidence, however, though general, ought to have reference to the particular crime charged; as, for instance, if a man is accused of assault, that he is invariably peaceable and inoffensive; if he is accused of theft, that he has the reputation of being an honest man.

608. The prosecutor, as a general rule, cannot, during his proof, lead evidence to shew that the accused is a man of bad character. He will not be allowed to lead evidence to give him a basis for the argument that because the accused is a man of bad character the probability is that he committed the crime libelled. If, however, the accused cross-examines the Crown witnesses with the object of establishing his good character, or with the object of laying a foundation for the evidence of his own witnesses on this point, it is competent for the prosecutor, before closing his proof, to lead rebutting evidence.[2] In the case of certain crimes, moreover, where evidence of character is important, it is competent both for prosecutor and accused to adduce such evidence. Thus, in cases of homicide in *chaude melle*, or in charges of assault, the prosecutor may prove that the accused is a man of passionate nature and violent temper. He may also lead evidence to establish that recent acts of aggression had been committed by the accused upon his victim, and he may do this without notice to the accused. If, however, remote acts of violence are to be established and founded on by the Crown, previous malice must be libelled.

609. Evidence of previous conviction may be merely a particular form of evidence as to character; or it may be to prove what is an

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[1] 1887 Act, s. 68. [2] See para. 615, *infra*.

element in the substantive offence charged (as, *e.g.*, in the case of certain statutory crimes which differ in quality according as there has or has not been a previous conviction of the same nature). For the former purpose, the leading of evidence of previous conviction by the prosecutor is even more jealously guarded than is the adducing of more general evidence of bad character. The Act of 1887 provides[1] that previous convictions against a person accused shall not be laid before the jury, nor shall reference be made thereto in presence of the jury before the verdict has been returned. Accordingly, in reading an indictment libelling previous convictions (or a summary thereof) to the jury, no reference is made to the part libelling these.[2] But nothing in the Act contained is to prevent the prosecutor from laying before the jury evidence of such previous convictions, where by the law existing prior to 1887 it was competent to lead evidence of such previous convictions *in causa* to support the substantive charge, or where the person accused shall lead evidence to prove previous good character.[1] As this, if done, must generally occur during the pannel's proof, it may be necessary for the prosecutor to put a question to prove the conviction in course of cross-examination. Notwithstanding the prohibition above cited, the Courts have not invariably treated a reference to a previous conviction in the hearing of the jury as fatal, where satisfied that it was inadvertent or casual and did not prejudice the fairness of the trial.[3]

610. The prosecutor is entitled to put in evidence the declaration (if any) emitted by the accused upon the charge for which he is under trial, or on a similar intended charge arising out of the same facts. The declaration is not evidence except in a question with the party who has given it; and it is evidence against him but not in his favour (except perhaps for the limited purpose of shewing the consistency of the account given by him of the occurrences in respect of which the charge has arisen). The accused cannot demand to have the declaration read if the prosecutor objects.[4] But in capital cases it is invariably read if desired.

611. If the charge includes being "habit and repute," *e.g.*, a thief (which is now somewhat rare), the fact must be proved *in causa*.[5]

612. The prosecutor, having led the evidence which he desires to submit, closes his case; and he cannot afterwards claim to introduce new evidence.[6] But in a summary prosecution in which the judge recalled a witness after the close of defender's case to prove the prosecutor's title, the conviction was sustained.[6] If at the conclusion of

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[1] 1887 Act, s. 67.

[2] *Ibid.*, Schedule P; and s. 54, as amended by 15 & 16 Geo. V. c. 20, s. 3.

[3] *White* v. *H.M. Advocate*, 1901, 3 Adam 479; 4 F. (J.) 3; *Cornwallis* v. *H.M. Advocate*, 1902, 3 Adam 604; 4 F. (J.) 82.

[4] See generally as to declarations, Macdonald, p. 489 *et seq.*

[5] *H.M. Advocate* v. *Hunter*, 1890, 2 White 501; 17 R. (J.) 57; and see observations in this case as to this aggravation; *H.M. Advocate* v. *Browne*, 1903, 6 F. (J.) 24.

[6] Cf. *Docherty and Anr.* v. *M'Lennan*, 1912, 6 Adam 700; S.C. (J.) 102, with *Saunders* v. *Paterson*, 1905, 7 F. (J.) 58; 4 Adam 568.

the Crown case the Court is satisfied that there is no evidence to go to the jury which would justify a conviction, it may so direct the jury without calling for evidence for the defence, and a verdict of "not proven" [1] (or more properly of "not guilty") [2] may be returned.

SUBSECTION (2).—*Leading of Evidence for Pannel.*

613. When the prosecutor has closed his case the pannel has the opportunity of leading evidence in his defence. The extent to which this is limited by the requirement of due notice in regard to special defences, attacks on character of witnesses and the like, and the lodging of lists of witnesses and productions, have already been sufficiently noticed in dealing with the earlier stages.

614. The accused may always lead evidence of good character. It may be noted here that the pannel has also the privilege in certain cases of attacking the characters of the persons who have been injured by him. The accused, however, must always give notice of such intention.[3] He may thus, in a case of assault, prove that the injured party was quarrelsome.[4] It is incompetent, however, to prove specific acts of violence committed by the injured party.[5] In cases of rape, the pannel may, on notice, cross-examine and lead evidence with the object of shewing that, immediately prior to the act in question, the woman was a person of loose morals.[6] It has not been decided whether it is competent to prove acts of intercourse with other men.[7] The accused, however, may prove that the woman had voluntary connection with him shortly before.[8] As to conduct subsequent to the injury, the Court has allowed the accused to prove that the woman had been guilty of an immoral act on the evening of the day of the alleged rape, but refused to admit evidence of later immorality.[9]

615. It is necessary to notice the position of the pannel or of his or her wife or husband in regard to giving evidence. By the Criminal Evidence Act, 1888,[10] the disability of accused persons and their spouses to give evidence in a criminal case (which had previously been relaxed by statute and in special cases) has been practically removed. Under that Act the person charged, or the husband or wife (as the case may be) of such person shall be a competent witness for the defence at every stage of the proceedings, whether the accused is charged solely or jointly with others.[11] But the person charged shall not be called as a witness except on his own application,[11] nor shall the husband or wife be called as a witness except on the application of the accused.[11]

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[1] *Craig*, 1867, 5 Irv. 523. [2] See *Phaup*, 1846, Ark. 176.
[3] *Brown*, 1836, 1 Swin. 293.
[4] *Blair*, 1836, Bell's Notes, p. 294; *Irving*, 1838, 2 Swin. 109.
[5] *Shiells or Fletcher*, 1846, Ark. 171.
[6] *Reid*, 1861, 4 Irv. 124; *Forsyth*, 1866, 5 Irv. 249.
[7] See *H.M. Advocate* v. *M'Farlane*, 1834, 6 Sc. Jur. 321; *Allan*, 1842, 1 Broun 500; *Blair*, 1844, 2 Broun 167. [8] *Blair, ut supra.*
[9] See *Leitch*, 1838, Bell's Notes, 84. [10] 61 & 62 Vict. c. 36. [11] *Ibid.*, s. 1.

But this is subject to exception in the case of charges under certain offences under statutes scheduled, and also where at common law the spouse might have been called without consent of the accused.[1] Neither spouse is compellable to disclose any communication made by the other during marriage.[2] A person charged and called as a witness under the Act is not liable to be asked, and if asked shall not be required to answer any question shewing or tending to shew that he has been guilty of any offence other than that with which he is charged or is of bad character, unless (*a*) the proof of this is admissible to shew guilt of the offence charged; or (*b*) he has personally or through his advocate asked questions of the witnesses for the prosecution with a view to establishing his own good character; or (*c*) has given evidence of his own good character; or (*d*) the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, or, finally, (*e*) he has given evidence against any other person charged with the same offence.[3] In any of these cases he is liable to be asked, and must answer, questions even though incriminating or detrimental to character; and incidentally to have put to him in cross-examination questions as to previous convictions which it would otherwise be inadmissible to submit to the jury *in causa*.

616. Where one of two or more persons charged gives evidence on his own account, it has been held that another accused along with him is entitled to cross-examine him.[4] Such cross-examination would, of course, be subject to the limitations just mentioned, but as generally it would only be useful where the evidence given had tended to implicate the party interested in the cross-examination the questions affecting character would be competent. It is not competent to call the wife or husband of a person charged in any case in which notice of witnesses is required, unless notice be given in the ordinary way.[5] But no such notice is necessary in order to entitle the accused himself to give evidence.[6]

617. It is expressly laid down that the failure of any person charged with an offence, or of the wife or husband as the case may be of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution.[7] Notwithstanding this, the Court has in two cases declined to treat the circumstance of reference having been made (or being alleged to be made) by the prosecutor to the fact of the failure of the complainer to give evidence as being *per se* sufficient to invalidate a conviction.[8] Moreover, it has been held that a judge is entitled to take into consideration the fact that the accused has not given evidence upon his own behalf,[9] and in the same case the opinion

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[1] 61 & 62 Vict. c. 36, s. 4 (1), (2). [2] *Ibid.*, s. 1 (*d*). [3] *Ibid.*, s. 1 (*f*), (i)–(iii).
[4] *Hackston* v. *Millar*, 1906, 8 F. (J.) 52; 5 Adam 37.
[5] 61 & 62 Vict. c. 36, s. 5; and 1887 Act, s. 36.
[6] *Kennedy* v. *H.M. Advocate*, 1898, 2 Adam 588; 1 F. (J.) 5.
[7] 61 & 62 Vict. c. 36, s. 1 (*b*).
[8] *Ross* v. *Boyd*, 1903, 4 Adam 184, 5 F. (J.) 64; *M'Allee* v. *Hogg*, 1903, 4 Adam 190; 5 F. (J.) 67.
[9] *Brown* v. *Macpherson*, 1918, J.C. 3.

was expressed that a judge trying a case with a jury may legitimately comment upon that fact to the jury.

SUBSECTION (3).—*Addresses to Jury and Judge's Charge.*

618. After the evidence for the defence has been led, counsel (or, in a Sheriff Court, the Procurator-Fiscal) for the prosecution addresses the jury, and counsel for the accused (or the pannel himself if unrepresented by counsel) follows in reply. Counsel for the prosecution has not, as in England, the right again to speak in reply to him.

In ordinary course, the speeches of counsel for the parties are followed by the summing up or charge by the judge to the jury, after which it is left to the jury to consider their verdict. It is quite competent for a jury to bring in a verdict without leaving the Court.[1] But as a rule they do retire for deliberation, and until their verdict is returned they should not be communicated with by others than the officials of the Court.

619. Prior to the Criminal Appeal Act, 1926, a conviction could not be interfered with on the allegation that the presiding judge failed to lay down the law correctly to the jury in his charge.[2] Indeed there was no provision for a record of the charge. And even when there was some deviation on the part of the judge from usual practice, the Court would assume that he had given to the jury all necessary directions in view of this.[3] But there is a "strong desirability in these matters of walking strictly according to the ordinary and traditional procedure which has been evolved by long experience. For there is always risk of miscarriage, more or less, if the well-tried and understood forms of judicial procedure are unnecessarily departed from in any respect."[4] These observations were made in a case in which the Sheriff had handed to the jury at the close of his charge a written note of two questions to which he had specially directed attention in course thereof.

620. It may be observed that it is always competent for the pannel, at any stage before the jury retire to consider their verdict, to withdraw the plea of "not guilty" tendered by him and to tender a plea of "guilty" either to the whole charge or to part of it. If this be done, then (subject in the latter case to acceptance by the Crown) the plea is recorded and signed by the pannel and the presiding judge (and in case of a partial plea, by Crown counsel); and the jury, upon the direction of the judge, bring in a verdict finding the pannel guilty (as libelled, or to the extent of the plea), in terms of his own confession. The results following upon this are as in the case of a verdict to the same effect arrived at in ordinary course.

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[1] 54 Geo. III. c. 67, s. 1.

[2] Alison, ii. 679, 680; *Quarns* v. *Hart*, 1866, 5 Irv. 251, and see *Cameron* v. *H.M. Advocate*, 1924, J.C. 101, at p. 105.

[3] *Cameron* v. *H.M. Advocate*, *supra*.

[4] *Ibid.*, per Lord Justice-General Clyde.

Section 19.—Verdict.

Subsection (1).—*Return and Record of Verdict.*

621. The verdict may be unanimous or by a majority of the fifteen jurors who form the assize. It is not necessary, as in civil cases, that the jury be enclosed for three hours before they are entitled to return a verdict by a majority. They may do so at any time. All verdicts returned before the adjournment of the Court (as they now invariably are) are announced *viva voce* by the foreman or chancellor chosen by the jury. If the jury are not unanimous, this circumstance must be stated by the foreman in announcing the verdict. When the jury are ready to return their verdict, they are asked by the clerk of Court to do so, and it is then announced by the foreman. The clerk of Court enters it in the record, and reads it over to the jury after he has completed the entry. Failure to read the verdict when recorded, though an irregularity to be deprecated, is not a deviation which renders the proceedings fundamentally null.[1] If the verdict requires amendment or explanation, the judge asks the jury to make or give this.[2] But this must be done before the verdict is recorded. After recording, the verdict cannot be altered or explained.[3] Written verdicts are now unknown in practice.[4] A jury in a criminal trial may return a verdict of acquittal (which may be "not guilty" or "not proven") or of condemnator.

Subsection (2).—*Acquittal.*

(i) *On Ground of Insanity.*

622. The jury may find that the accused was insane at the time of the offence. Further, they may find, at any stage of the trial, that the accused is then insane,—this latter verdict not being, strictly speaking, one of acquittal. In either of these cases the accused is ordered to be detained during the Royal pleasure.[5]

(ii) *Verdict of Not Guilty or Not Proven.*

623. After a verdict to this effect has been returned, the judge assoilzies the accused and dismisses him from the bar, unless cause be shewn for detention on a different charge. A verdict of acquittal may be returned after evidence has been led, or formally, after the prosecutor has abandoned the charge, or the Court has directed the jury to acquit. In the two latter cases the proper verdict is one of "not guilty." [6]

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[1] *Torri* v. *H.M. Advocate*, 1923, J.C. 52.

[2] *Alexander*, 1823, Shaw (Just.) 99; *Wilsons*, 1826, Syme 38; *Hardie*, 1831, Bell's Notes, 296; *Harvey*, 1833, *ibid.*; *Waiters*, 1836, 1 Swin. 273.

[3] *Anderson*, 1830, Bell's Notes, 295; *Hunter*, 1838, 2 Swin. 1, at p. 15.

[4] See 54 Geo. III. c. 67; 6 Geo. IV. c. 22, s. 20; 9 Geo. IV. c. 29, s. 15.

[5] 20 & 21 Vict. c. 71, s. 87; 34 & 35 Vict. c. 55.

[6] *Galloways*, 1836, 1 Swin. 232; *Phaup*, 1846, Ark. 176; but see *Craig*, 1867, 5 Irv. 523.

SUBSECTION (3).—*Condemnator.*

624. When the indictment contains only one charge, or two or more charges stated cumulatively, the jury, in convicting a pannel, return a general verdict of "guilty," and the clerk enters this on the record as "guilty as libelled." Verdicts which merely find facts, and which make no general finding, are now unknown in practice.[1] Such finding of facts must be accompanied by a general finding exhausting the question or questions raised in the charge.[2] It is necessary that the specific facts found infer guilt,[3] and they must also be consistent with the charge. Thus it would be incompetent to return a verdict of murder by stabbing under an indictment for murder by poisoning. But mere deviations from the charge, which do not amount to inconsistencies, will not invalidate a verdict.[4] If a general verdict of guilty does not necessarily imply a crime, the verdict is bad.[5]

625. The verdict must dispose of the whole libel, excepting any charges which have been withdrawn. If the verdict deals only with one charge of several, or with one prisoner of several, it will be held an acquittal as to those with which it does not deal. There must be an express finding as to the guilt of each accused. A verdict that "both or either" of two accused did a certain act is no warrant for any sentence. Where the charges are alternative, a verdict of guilty will not warrant any sentence.[6] But a verdict of "guilty" is sufficient where by statute one offence may be charged as having been done in one or other of several ways, the particular mode being of no consequence.[7] If a charge is made under a statute which sets forth a number of acts which may constitute the statutory offence, a general verdict may be bad, as failing to set forth the exact offence which was found proven.[8] Where two *loci* were libelled on alternatively, a general verdict of conviction

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[1] But see *H.M. Advocate* v. *Breen*, 1921, J.C. 30, per Lord Justice-General Clyde at p. 39.

[2] See *Cumming*, 1848, J. Shaw, 17, 35, per Lord Justice-Clerk Hope at p. 61.

[3] *Milne* v. *Simpson*, 1874, 2 Coup. 562; and cf. *Davelin* v. *Jeffrey*, 1836, 1 Swin. 41; *Mullen* v. *Kidston*, 1845, 2 Broun 664; *M'Innes* v. *Barclay & Curle*, 1856, 2 Irv. 548; *Greig* v. *Jopp*, 1863, 4 Irv. 369; *Macmillan* v. *H.M. Advocate*, 1888, 1 White 572; *Calder* v. *Linlithgow Local Authority*, 1890, 2 White 472; *Sharp* v. *Dykes*, 1843, 1 Broun 521; *Graham* v. *Threshie*, 1888, 2 White 96.

[4] *Cf. M'Gall*, 1849, J. Shaw 194; *Henderson*, 1850, J. Shaw 394; *Dougal* v. *Dykes*, 1861, 4 Irv. 101; *Kennedy*, 1838, 2 Swin. 213; *Cumming*, 1848, J. Shaw 17, 35; *Sutherland*, 1856, 2 Irv. 455; *Sneddon*, 1866, 5 Irv. 305; *H.M. Advocate* v. *Thomson*, 1874, 2 Coup. 551; *Mackenzie* v. *Fraser*, 1882, 5 Coup. 124; 10 R. (J.) 2; *Beattie* v. *Dumfriesshire Procurator-Fiscal*, 1842, 1 Broun 463.

[5] See *Arthur* v. *Peebles*, 1876, 3 Coup. 300; 3 R. (J.) 38; *Walker & Co.* v. *Rodger*, 1885, 5 Coup. 595; 12 R. (J.) 32.

[6] See, *e.g.*, *Greig* v. *Stewart*, 1877, 3 Coup. 382; 4 R. (J.) 13; *Boyd* v. *M'Jannet*, 1879, 4 Coup. 239; 6 R. (J.) 43; *Charleson* v. *Duffes*, 1881, 4 Coup. 470; 8 R. (J.) 34; *Duncan* v. *Laing*, 1888, 2 White 104; *Bell* v. *M'Phee*, 1883, 5 Coup. 312.

[7] Cf., *e.g.*, *Scott* v. *Morrison*, 1872, 2 Coup. 218; *O'Neill, etc.* v. *Campbell*, 1883, 5 Coup. 305; 10 R. (J.) 76; *Macnaughton* v. *Maddever*, 1884, 5 Coup. 509; *Shaw* v. *Hart*, 1886, 1 White 270; and *Maxwell* v. *Marsland*, 1889, 2 White 176; 16 R. (J.) 48.

[8] *De Banzie* v. *Peebles*, 1875, 3 Coup. 89.

against two accused, which did not specify the *locus*, was held bad.[1] Where a charge against a seaman was that he disobeyed the order of A. or of B., a general conviction which did not state whose order had been disobeyed was set aside.[2] A verdict is bad which acquits of a general charge but convicts of a special, where the latter particularises the former.[3] The same result follows where two acts are charged as together constituting one offence, and the verdict finds that only one has been committed, or where an act is charged along with an aggravation, and the aggravation alone is found proved.[4]

626. A verdict must be free from ambiguity.[5] If the meaning of the verdict is plain it will not be disturbed. Thus a verdict of guilty of the "wilful and culpable neglect charged" was held to cover the whole charge, as if it had been "guilty as libelled." [6] A conviction of stealing "a part" of the articles libelled has been sustained.[7] A verdict convicting of what is not charged is bad. Thus a verdict of "guilty of the crime charged, aggravated as charged," was held to be inept, there being no aggravation set forth in the libel.[8]

627. The rules of law which required that a verdict must exhaust the whole libel, that it must be logically consistent with the charge, and that it must be complete and unambiguous, have been considerably modified by the provisions of the Criminal Procedure Act of 1887. By this statute [9] it is now competent, under an indictment for robbery, or for theft, or for breach of trust and embezzlement, or for falsehood, fraud, and wilful imposition, to convict an accused person of reset. Under an indictment for robbery, or for breach of trust and embezzlement, or for falsehood, fraud, and wilful imposition, a person accused may be convicted of theft. Under an indictment for theft, a person accused may be convicted of breach of trust and embezzlement, or of falsehood, fraud, and wilful imposition, or may be convicted of theft, although the circumstances proved may in law amount to robbery (s. 59). Where in an indictment two or more crimes are charged cumulatively, it shall be lawful to convict of any one or more of them. Any part of what is charged in an indictment, constituting in itself an indictable crime, shall be deemed separable to the effect of making it lawful to convict of such crime. Where any crime is charged as having been committed with a particular intent, or with particular circumstances of aggravation, it shall be lawful to convict of the crime without such intent or aggravation (s. 60). Under an indictment which charges a completed

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[1] *Downs and Mercer* v. *Stevenson*, 1882, 4 Coup. 567; 9 R. (J.) 11.
[2] *Reaney* v. *Maddever*, 1883, 5 Coup. 367.
[3] *Hunter*, 1838, 2 Swin. 1.
[4] *Beatson*, 1820, Shaw (Just.) 18; *Wilsons*, 1826, Syme 38.
[5] See, *e.g.*, *Sharp* v. *Dykes*, 1843, 1 Broun 521.
[6] *M'Rae*, 1842, 1 Broun 395; see also *Macfarlane* v. *Perthshire Procurator-Fiscal*, 1843, 1 Broun 585; *Reid*, 1844, 2 Broun 313; *Grant* v. *Mackenzie*, 1854, 1 Irv. 548.
[7] *Brodie* v. *Johnston*, 1845, 2 Broun 559.
[8] *Donald* v. *Hart*, 1892, 3 White 274; 19 R. (J.) 88.
[9] 50 & 51 Vict. c. 35, s. 59.

crime, the person accused may be lawfully convicted of an attempt to commit such crime. Under an indictment charging an attempt, the person accused may be convicted of such attempt, although the evidence be sufficient to prove the completion of the crime said to have been attempted. Under an indictment which charges a crime which imports personal injury inflicted by the person accused, resulting in death or serious injury to the person, the person accused may be lawfully convicted of the assault or other injurious act, and may also be lawfully convicted of the aggravation that such assault or other injurious act was committed with intent to commit such crime (s. 61). Where any act set forth in an indictment as contrary to any Act of Parliament is also criminal at common law, or where the facts proved under such an indictment do not amount to a contravention of the statute, but do amount to a crime at common law, it shall be lawful to convict of the common-law crime (s. 62).

628. By the Criminal Law Amendment Act, 1885,[1] it is provided that under an indictment charging a person with rape or felony under s. 4 of the Act, the jury may find that the accused is guilty of minor offences under other sections of the Act, or of an indecent assault, and the accused will be punished accordingly. This Act applies to the United Kingdom, but it is doubtful whether such a verdict is competent in Scotland, unless the statute be referred to in the indictment.[2]

629. A somewhat peculiar situation arises under the Mental Deficiency and Lunacy (Scotland) Act, 1913,[3] by which it is enacted that "where any person is charged with any offence punishable in the case of an adult with penal servitude or with imprisonment . . . if the Court is of opinion that the charge is proved . . . the Court if it appears to it that such person . . . is a defective within the meaning of this Act may without proceeding to convict . . ." adjourn the proceedings —reporting the case to a local authority or the Procurator-Fiscal with a view to presentation of a petition for a judicial order under the Act (for treatment of the accused as a person mentally defective)— "provided that for the purposes of this Act a prisoner shall be deemed to be a person found guilty of an offence where the Court is of opinion that the charge is proved." [4] Provision is further made for detention of a defective pending further proceedings; and where it appears to the prosecutor that the accused is a defective, a duty is laid upon the prosecutor to bring before the Court any available evidence on the mental condition of the accused person. It has been laid down [5] that under these provisions it is for the jury, and not for the judge before the jury is empanelled, to determine (*a*) whether the charge is or is not proved, and (*b*) if the charge is found proved, whether the accused is

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[1] 48 & 49 Vict. c. 69, s. 9.

[2] See *H.M. Advocate* v. *Barbour*, 1887, 1 White 466, and *H.M. Advocate* v. *Henderson*, 1888, 2 White 157.

[3] 3 & 4 Geo. V. c. 38, s. 9.

[4] *Ibid.*, s. 9 (2).

[5] *H.M. Advocate* v. *Breen*, 1921, J.C. 30.

or is not a defective within the meaning of the Act. If the jury find the charge proved and find that the accused is not a defective, the judge will interpret their verdict as one of "guilty," and will pronounce sentence in the ordinary way, but if the jury find the charge proved, then, notwithstanding the terms of s. 9 (2), the judge will not *hoc statu* interpret the verdict as one of "guilty," but will adjourn the proceedings with a view to obtaining a judicial order under the later part of s. 9. Where such an order is obtained, the proceedings at the adjourned diet will terminate without an interpretation of the verdict and without the passing of sentence. Where such an order is not obtained, the judge will then interpret the verdict as one of "guilty" and will pronounce sentence in the ordinary way. In the case under notice, it was observed that s. 9 is not applicable to a case in which the accused pleads guilty, and this would apparently be so even if, owing to such a plea being tendered in course of a trial, the verdict of guilty were formally returned by the jury. When a sentence of imprisonment follows upon such a plea, the prisoner's remedy, if he alleges that he is a defective, is by application to the Secretary for Scotland under the Act.[1] It is competent for the accused himself in course of a trial to lead evidence of mental deficiency provided due notice of this intention has been given.[2]

Section 20.—Conviction and Sentence; Aggravations and Mitigating Considerations.

Subsection (1).—*Conviction.*

630. When the verdict of the jury condemnator has been recorded as explained in the preceding section, the next stage in the proceedings appears on the surface to be that concerned with sentence. But before sentence there must be conviction of the crime for which sentence is to be pronounced. For practical purposes it is true that a conviction of a criminal charge in proceedings in solemn form is reached when the jury returns a verdict of guilty, either upon evidence or upon the judge's direction where the pannel has pled guilty; or when the judge, upon such a plea, reaches the conclusion that guilt has been established. A conviction, before anything can follow upon it, must be recorded. In the case of a trial by jury this is regarded as done when the verdict, being recorded in the record, has been read to the jury by the clerk. But the case noticed, of *Breen*,[3] directed attention to the question whether a verdict of guilty by a jury *eo ipso* constitutes conviction, or whether something supplementary to this is not required. In that case the Court held that under the Mental Deficiency Act, 1913,[4] it is for the jury to find whether or not the charge made is proved. But then

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[1] 3 & 4 Geo. V. c. 38, s. 10.
[2] *H.M. Advocate* v. *Breen*, 1921, J.C. 30.
[3] *H.M. Advocate* v. *Breen*, *supra*; see per Lord Justice-General Clyde at pp. 39, 40.
[4] 3 & 4 Geo. V. c. 38, s. 9.

the same section goes on to provide that a person shall be deemed to be found guilty of an offence "where the Court is of opinion that the charge is proved"; and yet the direction is that if, along with this, the Court (jury) find the accused to be mentally defective, the Court (judge) "without proceeding to convict shall adjourn the case for the purposes specified in the Act." It thus appeared that for the purposes at least of this particular Act something more was requisite for conviction than a verdict which the statute interpreted to be one of guilty. In giving judgment Lord Justice-General Clyde laid it down [1] that in the case of a verdict in the usual form ("guilty as libelled") the verdict of the jury is the conviction, because by its own terms and force it establishes guilt. But he adds that this results from direction of the judge, the jury being told by him to return their verdict in this way if they find such-and-such facts to have been proved; essentially the jury are judges of the facts, the question whether these necessarily infer guilt being always a question for the judge and never one for the jury. "It may be difficult," he said, "to imagine a case in which the verdict finding the charge proved could be held not to infer guilt, but the inference does require to be made, and the duty of making it is on the judge. Even when an accused person pleads guilty, it is only in popular language that he is said to convict himself. It is the law operating through the judge that convicts him, and the conviction is properly said to proceed upon the plea." From this judgment, in which the four other judges sitting concurred, it seems to result that in the normal case where the jury's verdict is recorded either on the direction of the judge or with his tacit approval in the form "guilty as libelled," or in equivalent words, this amounts to conviction; but that in special circumstances, such as those dealt with in the Mental Deficiency, etc., Act, it may be proper to take the verdict of the jury merely upon special facts and to regard the conviction as superimposed upon it afterwards by the judge. The possible later developments figured in *Breen's* case suggest the difficulty of following this distinction through in all cases to its logical conclusions. The considerations in regard to definiteness, etc., applicable to the record of a conviction where separable from the verdict are sufficiently covered by what is written above in regard to these qualities in a verdict.

Subsection (2).—*Acquittal.*

631. If the verdict of the jury be one of "not guilty" or "not proven," on this being recorded the judge interpones his authority to it by assoilzieing the accused and dismissing him from the bar (unless, indeed, cause be shewn for his detention upon a different charge).[2] In order to this the accused must be present, except in special circumstances, *e.g.* illness.[2] Where the acquittal is on the ground of insanity

[1] 1921, J.C. at p. 39. [2] Macdonald, p. 510.

the accused is ordered to be detained in custody till His Majesty's pleasure be known;[1] and the same result follows on a verdict finding insanity at the time of trial.

Subsection (3).—*Sentence.*

(i) *Motion for Sentence.*

632. If on the other hand the verdict be one resulting in a conviction of the accused, the prosecutor normally proceeds to move for sentence. No sentence can be pronounced if the prosecutor does not appear, or if he declines to move for sentence; and it is always in the power of the prosecutor even after verdict to desert the diet *simpliciter* without moving for sentence.[2] Moreover, in a capital case at any period of the trial and even after verdict, the prosecutor may restrict the pains of law to an arbitrary punishment; and a charge laid both on statute and common law may be restricted to the common law charge, or *vice versa*.

(ii) *Aggravations.*

633. In moving for sentence, the prosecutor will bring to the notice of the Court any competent aggravations other than circumstances which are libelled as part of the charge and which have been found by the verdict. Of such aggravations, the chief, if not the only, example is that of previous conviction. A previous conviction of a similar crime is regarded as an aggravation of the offence charged, and, where competently libelled, is to be taken into consideration in awarding punishment for the offence under trial. To be competently founded on, a previous conviction must be a proper legal conviction and reached prior to the offence under trial.[3] The indictment must make it clear that the previous conviction founded upon is libelled against, and is applicable to, the particular pannel.[4]

634. Prior to 1870 a previous conviction, if it were to be founded on in Scotland at common law, required to be a conviction by a Scottish tribunal. But in that year, it was enacted that a previous conviction in any one part of the United Kingdom may be proved against the prisoner in any other part of the United Kingdom, and this whether the conviction has been obtained before or after the passing of the Act.[5] The Criminal Procedure Act of 1887 declared that this is the law as to the three classes of aggravation by previous conviction mentioned in that statute and hereinafter referred to (ss. 63, 64, and 65). Under the Act of 1887 it is not necessary to set forth in the indictment any previous conviction or productions that are to be used against the accused person, but it shall be sufficient to enter them in the list of

[1] See Acts 20 & 21 Vict. c. 71 and 34 & 35 Vict. c. 55.

[2] *Nicolson*, 1829, and *Smith*, 1842, both mentioned in Bell's Notes, 300.

[3] *Grant* v. *Allan*, 1889, 2 White 261; 16 R. (J.) 87; *Mitchell or Carr*, 1837, Bell's Notes, 32; *Graham*, 1842, *ibid.*, and 1 Broun 445.

[4] *H.M. Advocate* v. *Shedden*, 1898, 2 Adam 476.

[5] 33 & 34 Vict. c. 112, s. 18.

productions to be used at the trial, every such conviction being therein described as a conviction applying to the person accused against whom it is to be used (s. 19).

635. Prior to 1887, a previous conviction, in order to be used as an aggravation of a subsequent offence, required to be of a crime similar to that subsequently committed. Thus prior to that year, a previous conviction of breach of trust and embezzlement could not, *e.g.*, be founded on as an aggravation of theft. But under the Act of 1887 three classes of aggravations by previous convictions have been established, viz.: (1) crimes inferring dishonesty; (2) crimes inferring violence; (3) crimes inferring indecency. It is provided that extracts of previous convictions of crime inferring dishonesty may be lawfully put in evidence as aggravations of crimes inferring dishonesty or attempts to commit such crimes subsequently committed, and that any aggravation of the crime or attempt which such extract conviction bears to have been found proven, may be lawfully used in evidence to the like effect (s. 63). It is incompetent to libel, as previous convictions of crime inferring dishonest appropriation of property, certain convictions of being found in a place with intent to commit theft in contravention of s. 7 of the Prevention of Crime Act, 1871,[1] and similar provisions of certain Police Acts, these not being crimes or attempts at crime against property within the meaning of s. 63.[2] Similar provisions are made as to crimes inferring violence (s. 64), and as to crimes inferring indecency (s. 65).

636. The proof of extract convictions of crime and the mode of using them at the trial are dealt with by the Act of 1887. It is provided that an extract conviction of any crime committed in any part of the United Kingdom, bearing to be under the hand of the officer in use to give out such extract convictions, shall be received in evidence without being sworn to by witnesses. Such conviction shall be held to apply to the person accused, to whom notice is given in the list of productions that it is to be used against him, unless he shall give written notice as hereinbefore stated,[3] that such extract conviction is not under the hand of the proper officer, or that it does not apply to such accused person, or of any other objection to its validity or admissibility. Where such notice is given, it shall be competent to prove by a witness or witnesses such previous conviction or any facts relevant to the admissibility of the same, although the name of any such witness be not included in the list served on the person accused. The person accused shall also be entitled to examine witnesses in regard thereto. An official of any prison in which such person accused may have been confined on such conviction shall be a competent and sufficient witness to prove the application thereof to the person accused although he may not have been present in Court at the trial to which the extract produced of such conviction relates (s. 66).

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[1] 34 & 35 Vict. c. 112.

[2] *H.M. Advocate* v. *Coggans and Anr.*, 1905, 4 Adam 635; 8 F. (J.) 109.

[3] *Supra*, para. 561.

637. It is provided that previous convictions against a person accused shall not be laid before the jury, nor shall reference be made thereto in presence of the jury before the verdict is returned (s. 67).[1] Nothing contained in the Act of 1887 shall prevent the public prosecutor from laying before the jury evidence of such previous convictions, where, by the law existing prior to 1887, it was competent to lead evidence of such previous convictions as evidence *in causa* in support of the substantive charge, or where the person accused shall lead evidence to prove previous good character. It shall no longer be necessary for the jury to return a verdict finding whether previous convictions against the persons accused have been proved or not (s. 67). Where any such conviction is admitted in evidence by the Court, either after a plea of guilty, or after a verdict of guilty, to any charge to which such previous conviction constitutes an aggravation, the Court shall have power to take such previous conviction into consideration in awarding punishment. Where any person is convicted of any crime, and also of any aggravation by previous conviction, the clerk of the Court in which sentence is pronounced shall enter in the record of the trial a statement of the contents of any extract conviction that is put in evidence, setting forth the date, the place of trial, the Court, the nature of the crime, the aggravations accompanying it, if any, and the sentence pronounced; and where such person is again accused of any offence, in regard to which such conviction may be competently used as an aggravation, a duly certified extract of the conviction, setting forth the particulars of previous conviction as above, shall be admissible and sufficient as evidence to prove against him all the previous convictions and aggravations therein set forth (*ibid.*). If the offence charged is libelled as a second substantive offence, the earlier offence must be proved *in causa* as a separate offence to justify imposition of the appropriate heavier sentence.[2]

(iii) *Pleas in Bar of Sentence.*

638. As the prosecutor is entitled to urge such considerations with the view of obtaining a heavy sentence, so on the other hand the accused (who must always be present when sentence is pronounced, unless convicted under a statute which allows of trial and conviction in absence, or in case of sentence of outlawry, which is necessarily pronounced in absence) has the opportunity before sentence is pronounced of submitting any plea in bar of sentence. The competent pleas in bar are few. Thus it is incompetent to urge in bar objections to the libel,[3] or to the evidence which has been led. So, too, it is a bad objection to allege after the verdict has been returned that a juryman was out of

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[1] See *White* v. *H.M. Advocate*, 1901, 3 Adam 479; 4 F. (J.) 3; and *Cornwallis* v. *H.M. Advocate*, 1902, 3 Adam 604; 4 F. (J.) 82, as to this provision.

[2] *Russell* v. *Sinclair*, 1905, 4 Adam 589.

[3] *H.M. Advocate* v. *Allan*, 1872, 2 Coup. 402.

the custody of officers of the Court during the trial; the proper time to state this objection being before the jury have returned their verdict.[1] Among the pleas which have been held competent are:

(1) Insufficiency of the verdict to warrant sentence on the conviction.

(2) Objection to the powers of the Court to sentence, either from defect of constitution [2] or otherwise.

(3) If the accused at the time when sentence is moved for be not in his senses from whatever cause, the diet must be adjourned.[3]

(4) That the accused is unfit to undergo the sentence. Under this plea falls the case of a pregnant woman convicted of a capital crime; if pregnancy be alleged, a remit is made to skilled persons, and if the condition be established, the diet is continued from time to time until after delivery.[4]

(iv) *Pleas in Mitigation.*

639. The accused is also entitled to urge any competent plea in mitigation of punishment. Such a plea may be founded on the circumstances of the crime, *e.g.* constraint on the pannel; provocation, etc.; or it may be of the nature of an appeal *ad misericordiam*. The most frequently urged and the most frequently successful of such pleas is that founded on previous good character. If evidence of this has not been led *in causa*, a statement of any facts in support of the plea is in practice made by counsel, and often backed up by documentary evidence of previous good character, such as testimonials or certificates from former employers or clergymen or well-known citizens. Where these are not impugned by the prosecutor, the judge gives to them such weight as he deems appropriate. It is rarely that parole evidence is allowed to be led on either side, although there seems to be no good reason why the Court should not permit this for its guidance.

(v) *Sentence.*

640. This in its literal sense is the decision of the judge on the case; and it includes judgments of acquittal, complete or modified, as well as of condemnator. But the term is usually employed in the more restricted sense of the award of punishment inflicted by a judge after a verdict of guilty has been returned or plea of guilty given in a criminal case.

641. The sentence must be consistent with the libel. Thus if imprisonment were craved, it was incompetent at common law to order payment of a fine,[5] or to imprison where a fine was the punishment craved in the libel.[6] As the modern form of indictment does not include

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[1] *Luke*, 1866, 5 Irv. 293.
[2] See Macdonald, p. 512, and *Mackay and Broadly*, 1861, 4 Irv. 97.
[3] Hume, ii. 471; Alison, ii. 653; Macdonald, p. 512.
[4] Hume, ii. 467; Macdonald, p. 512.
[5] *Hood* v. *Young*, 1853, 1 Irv. 236. [6] *Orr* v. *M'Callum*, 1855, 2 Irv. 183.

a statement of the penalty sought, objections on this ground will not now arise in this form in solemn procedure. But substantially the same objection might arise if it were proposed to pronounce a sentence different from, or in excess of that applicable, say by statute, to the particular crime found to have been proved. In this connection the provisions of s. 43 of the Summary Jurisdiction Act, 1908 (which are applied to proceedings on indictment by s. 77 (4) of the Act [1]), allow modification of punishment and the infliction of fine instead of imprisonment, apparently (subject to certain exceptions [2]) even where the statute contravened prescribes a punishment.

642. Otherwise the sentence is discretionary subject to these qualifications: (1) in the Sheriff Court the limit is two years' imprisonment; (2) the power of the Court to inflict any sentence (except in the case of a juvenile offender or "young person") other than caution, fine, imprisonment, with or without hard labour,[3] or solitary confinement, penal servitude, with or without subsequent preventive detention, police supervision, or death, is now probably obsolete; (3) for murder the death sentence must be pronounced, and also for certain offences under the Act 10 Geo. IV. c. 38, unless (as is now invariably the case when a fatal result has not followed from the crime) the prosecutor restrict the pains of law; (4) the death sentence may not be pronounced or recorded against a child or young person, *i.e.* a person under the age of sixteen; [4] (5) in the case of certain statutory offences the statute contains directions as to the punishment to be awarded; [5] (6) constant practice is against any sentence short of penal servitude for a completed act of rape committed by a person of full age and full mental capacity. Imprisonment is not imposed for a longer period than two years, and penal servitude cannot be imposed for a less period than three years. Under the Prevention of Crimes Act, 1908,[6] provision is made for sentences of reformatory detention, and also for preventive detention of habitual criminals after their period of penal servitude has expired (see PUNISHMENT).

643. The presiding judge announces the sentence, which is minuted in the record and signed by the clerk of Court. Under the Criminal Procedure Act, 1887, in all cases, whether in the Sheriff Court or in the High Court of Justiciary, the sentence to be pronounced shall be announced by the judge in open Court; and all such sentences, except sentences of death, shall be entered in the record in the short form now in use in the Court of Justiciary; and it shall not be necessary to read the entry of the sentence from the record; and the form and mode in which any sentence of death shall be entered in the record shall be such as the High Court of Justiciary may appoint by Act of Adjournal (s. 57). In order to obviate a painful pause between the verdict of guilty and

[1] 8 Edw. VII. c. 65.
[2] *Ibid.*, s. 43.
[3] See PUNISHMENT, *infra.*, Part VI.
[4] 8 Edw. VII. c. 65, ss. 103 and 131.
[5] *Cf.* para. 641, *supra*, as to the effect on this of the Summary Jurisdiction Act, 1908.
[6] 8 Edw. VII. c. 59.

the sentence of death, the Act of Adjournal of 1st June 1909 was passed, which provides that after the verdict has been recorded, the judge or judges shall sign the sentence of death, on a paper separate from the record, and immediately thereafter the presiding judge shall pronounce the sentence of death. When the sentence has been engrossed in the record, the judge or judges shall sign it before proceeding to other business, but the pannel need not be present after sentence has been pronounced. Sentences of imprisonment run from the date of judgment unless otherwise stated. If the accused is already undergoing imprisonment for a previous offence, the new sentence may be appointed to commence on the expiry of the first period. In case of conviction on more than one charge it is competent to pronounce concurrent sentences of penal servitude and imprisonment, leaving it to the Executive to work these out, which, it is understood, there is no difficulty in doing.[1] In the case of a capital sentence, the Court must fix a date for the execution not less than fifteen days or more than twenty-one days after judgment, if south of the Forth; and not less than twenty-one days or more than twenty-seven days, if north of the Forth.[2] The High Court has power to alter the day fixed for an execution.

644. An incompetent or imperfect sentence, which has not been issued or acted upon, may be superseded by a correct one. The executorial part of a sentence may be altered after issue of the sentence, provided no substantial alteration is made upon the sentence itself[3] But after a sentence has been pronounced, it is incompetent for any Court, except under the provisions of the Criminal Appeal (Scotland) Act, 1926,[4] to make any substantial alteration or amendment of it.[5]

Section 21.—Criminal Appeal Act, 1926.

645. Sentence in the High Court of Justiciary was final until the coming into operation of the Criminal Appeal (Scotland) Act, 1926[6] (31st October 1926). There was no form of review.[7] This rule applied to all the procedure of the Court, to interlocutory judgments as well as to sentences (except as to sentences of preventive detention from which there was a specially provided appeal, now absorbed in that under the Act of 1926).[8] The exclusion of review still applies except in so far as appeal is competent under the Act of 1926. "Certification" by a judge on a point of novelty or difficulty was, and still is, competent, the provisions of the Act of 1926 as to the constitution of the Court being applicable at the hearing on the points certified.[9] Such certification stays further procedure at the trial *hoc statu*. A judge cannot

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[1] *H.M. Advocate* v. *Carson*, 1927, J.C. 70.
[2] 2 Geo. IV. and 1 Will. IV. c. 37.
[3] *Mackenzie* v. *Allan*, 1889, 2 White 253.
[4] See para. 645 *et seq.*, *infra*.
[5] But see *Stewart*, 1855, 2 Irv. 327; *Clarkson* v. *Muir*, 1871, 2 Coup. 125.
[6] 16 & 17 Geo. V. c. 15.
[7] *Ibid.*, s. 19 (2).
[8] *Ibid.*, s. 1 (*c*) and 12 (4).
[9] *Ibid.*, s. 12 (3).

proceed with the trial, reserving a point for consideration of a fuller Court. The right now possessed by an accused person to appeal against an error in law will probably discourage resort to certification with its resulting delay in any case in which the judge is reasonably satisfied that the point should be decided against the pannel. When the trial was before a Sheriff and jury there was prior to the 1926 Act no appeal; but if a conviction had followed, the sentence might be reviewed by the High Court in a process of suspension and liberation. The Act of 1926 gives a right of appeal in cases tried on indictment in the Sheriff Court as it does in those tried in the High Court, and it has abolished accordingly the old process of appeal by Bill of Suspension against any conviction, sentence, etc., pronounced in a Sheriff Court after 31st October 1927 in any proceedings on indictment.

646. The provisions of the Criminal Appeal Act, 1926, are dealt with under the head of APPEAL, CRIMINAL,[1] to which reference is made for the terms of the Act. At the time when that volume was completed (31st July 1926), the Act, though passed, had not become operative. And since then there has been promulgated on 27th October 1926 an Act of Adjournal in which the procedure to be followed under the Act is stated with fullness and precision. To this reference is made. It may be noted that it has been decided that where an application has been made to the High Court under s. 1 (*b*) and (*c*) of the Act for leave to appeal against a conviction and sentence on the ground that it was based on perjured evidence, the applicant must aver special circumstances pointing to perjury, a mere general statement that false evidence has been given being insufficient.[2] And, similarly, in case of an appeal under s. 2 (1) on the ground that the verdict of the jury is unreasonable and unsupportable having regard to the evidence, the Court will not review the evidence from the standpoint of whether it would have reached the same conclusion on the evidence, but will dismiss the appeal unless it can be shewn that the verdict is not one at which a jury could possibly have reasonably arrived on the evidence before them.[3]

647. It may be noticed that the Court having jurisdiction under the Act to try appeals is the High Court of Justiciary itself, constituted as provided under the Act.[4] The finality which attached at common law and under statute [5] to the decisions of the High Court is affirmed in the case of decisions on appeals under the Act.[6] Not even in the House of Lords is there any power to review the proceedings of this Court.[7]

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[1] *Ante*, Vol. I. p. 438 *et seq.*
[2] *Macmillan* v. *H.M. Advocate*, 1927, J.C. 62.
[3] *Webb* v. *H.M. Advocate*, 1927, J.C. 92; S.L.T. 631.
[4] 16 & 17 Geo. V. c. 15, s. 12 (1).
[5] 50 & 51 Vict. c. 35, s. 72.
[6] 16 & 17 Vict. c. 15, s. 17.
[7] *Mackintosh* v. *H.M. Advocate*, 1876, 3 R. (H.L.) 34.

PART V.—SUMMARY PROCEDURE.

Section 1.—Introduction.

648. Summary criminal procedure is the procedure which regulates the trial of crimes and offences of a less serious kind than are appropriate to the solemn procedure already described. It applies to all cases in which proceedings for the trial of an offence or the recovery of a penalty are instituted by means of a complaint, and tried by a judge or judges without the intervention of a jury, as distinct from a trial on indictment before judge and jury. Its purpose is to facilitate the determination of the charge or charges laid as expeditiously as is consistent with due preparation of the case for the prosecution, due notice to the accused person of the case he has to meet, and due opportunity afforded him for the presentation of his defence.

649. By Scottish law and practice, the choice as between solemn and summary procedure for the trial of offences lies with the prosecutor. Broadly speaking, the determining factors in his choice are two in number. (1) Is statutory direction given to try the particular type of case under solemn procedure or under summary? If solemn is indicated, that procedure must be followed. On the other hand, where the statute prescribes summary procedure, the latter must be adopted. (2) Where as in common law offences no statutory direction exists, is the offence one of such seriousness as can only be adequately dealt with in a Court of solemn jurisdiction? If he should decide that the offence could be properly met by such punishment as the judge in a summary Court is empowered to impose, then it will be prosecuted summarily. Otherwise it will fall to be dealt with on indictment.[1]

Section 2.—Regulating Statutes.

650. The statutes which regulate summary criminal procedure are the Summary Jurisdiction (Scotland) Act, 1908,[2] with which are incorporated [3] certain sections of the Criminal Procedure (Scotland) Act, 1887,[4] then (in 1908) for the first time made applicable to summary procedure: the sections of the Criminal Justice Administration Act, 1914,[5] which apply to Scotland;[6] and, so far as regards the trial of youthful offenders under sixteen years of age, certain provisions of the Children Act, 1908.[7] Of these Acts of Parliament, the Summary Jurisdiction (Scotland) Act, 1908, is the leading one, and references to its provisions will be frequent throughout this part. For convenience of citation it will hereafter be referred to as "the 1908 Act"; and similarly the Criminal Procedure (Scotland) Act, 1887, will be cited as "the 1887 Act."

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[1] The High Court of Justiciary has power to revise the exercise of his discretion. *Clark and Bendall* v. *Stuart*, 1886, 1 White 191, per Lord M'Laren at p. 209.

[2] 8 Edw. VII. c. 65. [3] *Ibid.*, Sched. B. [4] 50 & 51 Vict. c. 35.

[5] 4 & 5 Geo. V. c. 58. [6] See s. 42. [7] 8 Edw. VII. c. 67.

651. The 1908 Act is declared to apply to summary proceedings in all Courts of summary jurisdiction (so far as they have jurisdiction), in respect of (*a*) any offence which might, prior to the passing of the Act, or may under the provisions of that or any future Act, be tried in a summary manner; (*b*) any offence, or the recovery of a penalty under any statute which does not exclude summary procedure; (*c*) any order *ad factum præstandum* or other order of Court or warrant competent to a Court of summary criminal jurisdiction; or (*d*) any proceedings which any Act of Parliament directs to be taken under the Summary Procedure Act, 1864, the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, any general or local Police Act, or any Act incorporating a section of an Act now repealed (1908 Act, s. 4). For certain more special proceedings, some of which fall within, and some without, the purview of the Act, its provisions should be consulted (*ibid.*).

Section 3.—Jurisdiction.

652. When it has been decided that a case is appropriate to summary trial, it has then to be determined what is the particular summary Court which possesses jurisdiction to deal with it. The main elements which enter into the determination are the following: (1) what are the Courts of summary jurisdiction, and what are their powers; (2) the *locus delicti;* (3) the effect of certain statutory extensions of jurisdiction; (4) in the case of common law offences, their gravity; and (5) in the case of statutory offences, what, if any, direction is afforded by the Act of Parliament contravened. These will be considered in the immediately following subsections.

Subsection (1).—*The Courts.*

653. The Courts of summary jurisdiction in Scotland are the following:—(*a*) Sheriff, (*b*) Justice of Peace, (*c*) Burgh, (*d*) Police, and (*e*) Bailie of the River and Firth of Clyde (s. 2). The powers which they possess are measured by the degree of punishment they can impose on persons whom they convict of common law offences. (1) The Sheriff Court can impose a fine not exceeding £25, or ordain the accused to find caution for good behaviour for a period not exceeding twelve months to an amount not exceeding £25 either in lieu of, or in addition to, a fine or imprisonment; in either case, award imprisonment in default, according to a graduated scale in s. 48, varying from five days to three months; or award imprisonment, with or without hard labour, for a period not exceeding three months (s. 11). Where a person is charged with an offence inferring dishonest appropriation of property, or attempt thereat, or personal violence, aggravated by at least two previous convictions, the Sheriff can award imprisonment, with or without hard labour, for a period not exceeding six months (s. 12). The Sheriff has a concurrent jurisdiction with every other Court within his sheriffdom in regard to all offences competent for trial in them (s. 11). (2) The

Justice of Peace, Burgh, and Police Courts can impose a fine not exceeding £10, or ordain caution for six months to an amount not exceeding £20 either in lieu of, or in addition to, a fine or imprisonment; in either case, award imprisonment in default according to the above scale, but not exceeding in all sixty days; or award imprisonment, with or without hard labour, for a period not exceeding sixty days (s. 7).

654. Apart from any question of the powers of punishment possessed by the foregoing Courts, it should be noted that by s. 8 of the 1908 Act there is a definite exclusion of the jurisdiction of all summary Courts other than the Sheriff Court in the case of the following categories of offences:—

(1) Murder, culpable homicide, robbery, rape, wilful fire-raising or attempt at wilful fire-raising;
(2) Stouthrief, theft by housebreaking, or housebreaking with intent to steal;
(3) Theft, or reset, or falsehood, fraud, and wilful imposition, or breach of trust and embezzlement, in each case to an amount exceeding £10;
(4) Theft, or reset, or falsehood, fraud, and wilful imposition, or breach of trust and embezzlement, in each case aggravated by two previous convictions (other than admonitions [1]) of any offence involving dishonest appropriation of property;
(5) Theft by opening lockfast places;
(6) Assault to the fracture of limb, or with intent to ravish, or to the danger of life, or by stabbing;
(7) Uttering forged documents, or bank or bankers' notes, or Coinage Act offences.

The only extent to which the inferior Courts (Justice of Peace, Burgh, and Police) can take cognisance of these offences is to remit the offenders against whom they are charged to the Sheriff Court, the procedure being to commit them to prison for not more than four days, pending intimation to the Procurator-Fiscal of the higher jurisdiction.[2]

Subsection (2).—*The* Locus Delicti.

655. When the *locus delicti* is within the territory of a Court, the accused is subject to the jurisdiction of that Court, provided the offence falls within its powers of trial. By the common law there is jurisdiction in the Scottish Courts to try cases of continuous crime which may have originated in another country, but are "substantially perpetrated" in this country; [3] and in cases of theft, reset, or fraud where there is continuous felonious possession, the accused may be tried in any jurisdiction in which he may be found in possession of the dishonestly acquired property.[4]

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[1] 1908 Act, s. 8, proviso.
[2] *Ibid.*, s. 9 and Sched. F.
[3] *H.M. Adv.* v. *Witherington*, 1881, 4 Couper 475.
[4] Hume, ii. 55.

SUBSECTION (3).—*Statutorily Extended Jurisdiction.*

656. Jurisdiction is also extended by certain statutes, so as to reach a person who has contravened their provisions elsewhere, but is apprehended or found within the territory of a Court. Examples are to be found in the Merchant Shipping Act, 1894,[1] the Coinage Offences Act, 1861,[2] and the Children Act, 1908.[3] In addition, the 1908 Act provides that an offender may be tried by any one of two or more Courts, under the following circumstances:—(*a*) Where an offence is committed in a harbour, river, arm of the sea, tidal or other water, which runs between or forms the boundary of the jurisdiction of such Courts; (*b*) where an offence is committed on the boundary, or within 500 yards of the boundary, of such Courts; (*c*) where an offence is begun within the jurisdiction of one of such Courts, and completed within that of another; (*d*) where an offence is committed in a vehicle employed in a journey, or on board a vessel employed in a river, lake, canal, or inland navigation, which passes through the jurisdiction of such Courts; (*e*) where an offence is committed in a vehicle or vessel, which passes in the course of its journey or voyage along a highway, road, river, lake, canal, or inland navigation, of which some part is the boundary of the jurisdiction of such Courts; and (*f*) where several offences have been committed by the same person in different counties, which, if committed in one county, could be tried under one complaint; but this last extension applies only to the Sheriff Courts of such counties.[4] The offence is dealt with, heard, tried, determined, adjudged, and punished, as if it had been wholly committed within the jurisdiction of the Court which tries it.[4]

SUBSECTION (4).—*Gravity of Offence.*

657. The selection of the particular summary Court which is appropriate to deal with an offence at common law is determined by the consideration whether its powers of punishment are regarded as sufficient to satisfy the ends of justice. A charge will not be tried in a summary Court which has not power to impose a fitting punishment. The decision on this matter lies with the prosecutor, guided by the common law powers of the various Courts.[5] A valuable power, however, exists in every Court of inferior jurisdiction to remit a case to a higher Court for disposal at any time, even in the course of the trial, should it be of opinion that the case is one which, owing to its circumstances, should be dealt with by such higher Court.[6]

SUBSECTION (5).—*Statutory Direction.*

658. In the case of offences which are constituted by Acts of Parliament, the test of jurisdiction is the statutory direction as to the Court in

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[1] 57 & 58 Vict. c. 60, ss. 684 and 686.
[2] 24 & 25 Vict. c. 99, s. 36.
[3] 8 Edw. VII. c. 67, s. 72 (2).
[4] 1908 Act, s. 10.
[5] Para. 653, *supra*.
[6] 1908 Act, s. 9.

which prosecution is authorised, irrespective of the degree of punishment, or amount of penalty. It is necessary to scrutinise with care the provisions of the Acts for guidance in this matter, since they vary greatly in their methods of dealing with jurisdiction. The following illustrate the most common cases:—(1) The simplest is where the statute expressly confers jurisdiction on a particular Court or Courts by name, as, *e.g.* the Street Betting Act, 1906,[1] where the phraseology used is, "an offence prosecuted summarily under this Act may be tried before the Sheriff, or before any magistrate of any royal, parliamentary, or police burgh." Here no difficulty arises. (2) It was held to be the equivalent of an express conferment of jurisdiction on a Police Court, when a Scottish statute, the Immoral Traffic Act, 1902,[2] imposed penalties on an offender who should be "convicted . . . before a Court of summary jurisdiction." The High Court held that "a" meant "any" and therefore included the Police Court.[3]

659. (3) The phraseology, the construction of which was responsible for the leading decision on summary jurisdiction (and its counterpart appears in very numerous Acts of Parliament), is the following, occurring in the Motor Car Act, 1903,[4] viz. "if any person acts in contravention of this provision he shall be liable *on summary conviction* . . . to a fine." Usually, as in that case, the words are unaccompanied by specific reference to any Court. The authority in question is the case of *M'Pherson* v. *Boyd*,[5] where Lord Dunedin said, "I have always understood it to be the law of Scotland that in the case of statutory offences, which are not offences at all until they are created by statute, the jurisdiction must be specially conferred on any Courts which have not universal jurisdiction, and the only Courts which have universal jurisdiction are the Sheriff Court and this Court (the High Court). I am talking of course of criminal matters." The effect of the decision was to deny jurisdiction under the Motor Car Act, 1903, to a Police Court magistrate. It is a good rule in practice in cases where the phrase "on summary conviction" stands alone, to assume that the jurisdiction lies in the Sheriff Court. (4) Occasionally cases occur in which the grant of jurisdiction may be inferred as matter of implication from the provisions of the statute, although there is no direct conferment. An example is to be found in the case of *M'Tavish* v. *Neilson*,[6] where a Police Court was held to have jurisdiction to try a complaint under the Diseases of Animals Act, 1894.[7] (5) Dubiety may be said still to exist as to the effect of yet another form of words which occurs, with occasional slight variation, in numerous Acts of Parliament, viz. "any offence against the Act may be prosecuted and . . . fine . . . recovered in manner provided by the Summary Jurisdiction (Scotland) Acts." Lord Trayner's opinion in *M'Tavish*, *supra*, which tended to give this expression a widened construction

[1] 6 Edw. VII. c. 43.
[2] 2 Edw. VII. c. 11.
[3] *Hall* v. *Macpherson*, 1913, 7 Adam 173.
[4] 3 Edw. VII. c. 36.
[5] 1907, 5 Adam 247.
[6] 1903, 4 Adam 303.
[7] 57 & 58 Vict. c. 57.

so as to authorise prosecution in Courts other than the Sheriff Court, was to some extent influenced by considerations special to that case.[1]

660. The 1908 Act (s. 13) empowers the Sheriff Court to try either by indictment or summarily any offence which is described in any statute as a "misdemeanour" or "a crime and offence." If the offence is tried summarily the sentence of imprisonment must not exceed three months,[2] save when wider powers are conferred by statute.

Section 4.—Institution of Proceedings.

Subsection (1).—*Time Limitation.*

661. Some Acts of Parliament fix a time-limit beyond which proceedings for a contravention of their provisions cannot be instituted, and such time-limit rules in all cases under these Acts. As regards all other statutory offences, proceedings must be commenced within six months after the contravention occurred, or in the case of a continuous contravention, within six months of the last date of such contravention (s. 26). It is competent to include the entire period during which the contravention has occurred. Proceedings are held to be commenced when a warrant to apprehend, or to cite, has been granted, provided the warrant is executed without undue delay (*ibid.*). It is thus necessary, before instituting proceedings for a statutory contravention, to make sure that these are not barred by the time-limit in the particular Act, or by the general time-limit above mentioned.[3] There is no such limitation as regards crimes at common law, though Hume [4] suggests twenty years. It may be accepted that these may be prosecuted so long as evidence can be obtained to establish the charge.

Subsection (2).—*Preliminary Warrants.*

662. When it is necessary to apply to a Court of summary jurisdiction for an incidental warrant or order, the application is made by petition in the form of Schedule F. Such contingencies may be indicated as the necessity of searching premises for stolen goods before any person has been charged,[5] of destroying diseased meat,[6] or the like. The necessity of giving intimation of such applications varies with the individual case. Warrants may be granted with or without intimation. For a case in which there was service of the petition upon a respondent, reference may be made to *M'Lauchlan* v. *Renton*.[7] Where necessary for the execution of any warrant or order of Court, warrant to open lock-fast places is implied (s. 17).

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[1] See comments thereon of Lord Dunedin in *M'Pherson* v. *Boyd*, 1907, 5 Adam 247.

[2] *Cf. Whillans* v. *Hilson*, 1909, 6 Adam 129.

[3] Illustrative cases are *Farquharson* v. *Gordon*, 1894, 1 Adam 405; *MacKnight* v. *MacCulloch*, 1909, 6 Adam 144; and *Archibald* v. *Plean Colliery Co.*, 1923, J.C. 80.

[4] ii. p. 136.

[5] But note effect of *Bell* v. *Black and Morrison*, 1865, 5 Irv. 57.

[6] Public Health Act, 1897, s. 43.

[7] 1910, 6 Adam 378.

SUBSECTION (3).—*Prosecutor.*

663. In supplement of the ordinary rules of law, applicable to all prosecutors, the 1908 Act contains some special provisions. All penalties, for the recovery of which in Scotland no statutory provision has been made, may be recovered by the public prosecutor of any Court which has jurisdiction (s. 27). The term "prosecutor" includes Procurator-Fiscal, Assistant Procurator-Fiscal, Burgh Prosecutor, and any other persons prosecuting in the public interest, and their representatives duly authorised (s. 2).

664. The right of private prosecution is recognised in Scotland in a limited number of cases. The qualifications which confer the right were stated by Lord Justice-Clerk Macdonald [1] to be the following: "(1) the qualification of a person injured or aggrieved by the criminal act of another, either by an injury caused to himself, or it may be to someone in close relationship to himself, *e.g.* as where a parent is killed, or a child is injured; (2) where the person has an interest to prosecute, from being by law entitled to the whole or part of the penalty, or being a direct sufferer by the offence committed, as in the case of tram-cars being driven at a prohibited speed past the complainer's house; (3) where by statute power is given to someone in a certain position, it being, in the view of the Legislature, expedient to confer the power to prosecute, which would not exist at common law." Lord Dunedin in the same case [2] referred to a fourth category: "it is quite possible that a title may be conferred on someone, not the Lord Advocate, by implication." In all cases, however, where a private individual prosecutes an offence at common law, or under an Act of Parliament which authorises imprisonment without the option of a fine, the concurrence [3] of the public prosecutor is requisite, unless specially dispensed with by statute (s. 18). Any law agent may sign a complaint and appear for, and conduct, any prosecution on behalf of a private prosecutor (s. 18). The Lord Advocate may, with consent of the Treasury, direct by order that all proceedings in the Sheriff Court under the Summary Jurisdiction (Scotland) Acts for a contravention of any Act of Parliament shall, notwithstanding anything to the contrary in such Act, be taken by and in name of the Procurator-Fiscal.[4]

SUBSECTION (4).—*Accused.*

665. It is unnecessary to refer to anything in addition to the ordinary rules of law applicable to persons accused of criminal offences, beyond drawing attention to the special provisions of the 1908 Act, in regard to the charging of persons who have offended in a corporate or fiduciary capacity. Proceedings may be taken either against such persons in

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[1] *Rintoul* v. *Scottish Insurance Commrs.*, 1913, 7 Adam 210, at p. 216.
[2] *Ibid.*, at p. 228.
[3] For a form of concurrence see *infra*, under "Instance," at para. 679.
[4] Sheriff Courts and Legal Officers (Scotland) Act, 1927 (17 & 18 Geo. V. c. 35), s. 12.

their corporate or fiduciary capacity, any penalty being recovered by civil diligence only; or against individual representatives of a company, association, or incorporation; but a trustee cannot be charged except in his fiduciary capacity (s. 28). The representative in the case of an ordinary company or firm may be any of the partners, or the manager, or the person in charge of the business, generally or locally; and in the case of an association, incorporation, or incorporated company, the managing director, or secretary, or other principal officer, or the person in charge, generally or locally. The offence charged against the representative is to be deemed the offence of the incorporation, and a conviction thereof may be libelled as an aggravation of any subsequent like offence by the same incorporation, though the individual charged may be different (*ibid.*). But the converse is not competent, *i.e.* to libel as an aggravation of an offence charged against the individual representative a conviction obtained against the incorporation in its corporate capacity.[1]

Subsection (5).—*Complaint.*

666. All proceedings under the 1908 Act for the trial of offences, or recovery of penalties, must be instituted by a complaint in the form contained in the Act (s. 18). The form of complaint and the manner of stating a charge are dealt with below.[2]

Subsection (6).—*Oath of Verity.*

667. In cases where, as preliminary to any procedure, a sworn information is required, it may be sworn before any judge, whether the subsequent procedure is in his Court or another Court (s. 16). Familiar illustrations are to be found in the case of applications for warrant to search suspected premises, *e.g.* a betting house,[3] a brothel,[4] or a shebeen.[5] A short form of oath suitable for such cases is to be found in the now repealed Summary Procedure Act, 1864,[6] in the following terms:—

"At , the day of , in presence of , , compeared A. B., the complainer (or a credible witness), who, being solemnly sworn, depones that what is contained in the foregoing complaint is true, as he shall answer to God.

[Signature of Complainer or Witness.]

[Signature of Judge.]"

Subsection (7).—*Warrants and Orders.*

668. Where the accused is to be cited to appear before the Court at any ordinary sitting, or at any special diet fixed by the Court, no warrant is necessary, the Act being itself a sufficient warrant for the citation of

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[1] *Campbell* v. *Macpherson*, 1910, 6 Adam 394.
[2] Paras. 675 to 682, *infra*.
[3] 16 & 17 Vict. c. 119, s. 11.
[4] 55 & 56 Vict. c. 55, s. 403.
[5] 3 Edw. VII. c. 25, ss. 82 and 96.
[6] 27 & 28 Vict. c. 53, Sched. B.

the accused and witnesses, under these circumstances (1908 Act, s. 21). On a complaint being laid before a judge, he may, on the motion of the prosecutor, (*a*) assign a diet for disposal of the case; (*b*) grant warrant to apprehend, where this appears to him expedient; (*c*) grant a search warrant; or (*d*) grant any other order, or interim order competent (s. 20). Warrants to apprehend or search must be signed by a judge; all other warrants or orders may be signed by judge or clerk (s. 16). The latter, if not the official clerk of Court or his depute, must be a person duly authorised (s. 2). Forms are furnished in Schedule D.

Subsection (8).—*Citation and Service.*

669. Citation is in the form of Schedule D, and proceeds on at least forty-eight hours' *inducice* (s. 21). Of course, longer *inducice* are desirable when this is possible. The Court may, in an emergency, reduce the *inducice* to less than forty-eight hours (*ibid.*). This will not be done unless there is risk of a miscarriage of justice if a longer notice is given. Certain Acts of Parliament prescribe their own *inducice*, as, *e.g.* the Licensing (Scotland) Acts, 1903 to 1921, which require a six-days' *inducice* in the case of complaints charging breach of certificate.[1] The citation may be delivered (*a*) to the accused personally; (*b*) at the accused's dwelling-house, place of business, or place where he is resident for the time (if he has no known dwelling-house or place of business) with a person resident or employed therein; (*c*) to a person on board and connected with a ship on which accused is employed; (*d*) in the case of an incorporation, to an official at its ordinary place of business; or in the same way as in civil procedure; or (*e*) in the case of a body of trustees, to one of their number resident in Scotland, or to their law agent there (s. 21). Service is made at any place within Scotland by an officer of law (s. 2), *i.e.* a constable, criminal officer, sheriff officer, warder, or any person having authority to execute a warrant of Court; and is proved either by the oath in Court of such officer, or by his written execution in the form in Schedule D (s. 25). Out of Scotland, service is regulated by the Indictable Offences Act, 1848,[2] the Indictable Offences Act Amendment Act, 1868,[3] and the Summary Jurisdiction (Process) Act, 1881,[4] the first two being made applicable to all competent offences (*ibid.*). A note may be attached to the citation, stating whether the case is to proceed to trial at the first or an adjourned diet (Schedule D). The former notification is always subject, however, to the Court's absolute power in its discretion to grant an adjournment.

Subsection (9).—*Apprehension.*

670. Warrants of apprehension under the 1908 Act are in the fewest possible words, the operative clauses being implied by the statute (s. 23,

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[1] See 1903 Act (3 Edw. VII. c. 25), s. 92.
[2] 11 & 12 Vict. c. 42.
[3] 31 & 32 Vict. c. 107, s. 4.
[4] 44 & 45 Vict. c. 24, ss. 4 and 5.

and Schedule D). The person apprehended must be brought before a Court competent to deal with his case not later than the first lawful day after his being taken into custody, provided such day is not a general fast, or a public or local holiday (*ibid.*). No warrant is required to bring before the Court a person who has been apprehended without a written warrant, or who attends voluntarily (*ibid.*). Where, at common law or under any statute, there is power to arrest a person without a warrant, a warrant for his arrest may competently be issued.[1] The 1908 Act also provides for the apprehension of witnesses in the rare case of such a step being needed (ss. 22 and 23). The accused immediately on apprehension is entitled, if he so desires, to have intimation sent to a law agent, and to have a private interview before he is brought into Court (s. 15). In the case of a youthful offender under the age of sixteen, the provisions of the Children Act, 1908,[2] must be kept in mind.

Subsection (10).—*Bail.*

671. In the ordinary course, there is no need to fix bail in summary procedure until the accused person has been brought before the Court. When, however, an accused person has been apprehended, charged with an offence which may be competently tried before a Court of summary jurisdiction (other than the Sheriff Court), the chief constable, or, in his absence, the officer in charge of a police station, may accept bail or deposit to an amount not exceeding £20, that such person will appear for trial before such Court, or the Sheriff Court, at a time and place specified in the acknowledgment granted to him, and at all other diets of Court (s. 14). The matter is entirely in the discretion of the officer, who incurs no responsibility for damages if he refuses to accept bail. The person may be liberated without bail, or discharged. If the person liberated fails to appear at the trial, his bail may be forfeited, and a warrant granted for his apprehension (*ibid.*). Bail subsists till the case is finally disposed of, or until the expiry of six months; but the cautioner may withdraw his bond at any diet at which accused personally appears (s. 50). The principles regulating the grant and refusal of bail are laid down in the cases of *Mackintosh* v. *M'Glinchy*[3] and *H.M. Advocate* v. *Quinn and Macdonald*,[4] and though in both the matter arose under solemn procedure, these principles are equally applicable to the procedure of the summary Courts.

Subsection (11).—*Adjournment for Inquiry.*

672. Where it is desirable to allow time for inquiry, or the step is otherwise expedient, a Court of summary jurisdiction, without calling on the accused to plead to the charge, may from time to time continue the case for a reasonable time, not exceeding in all seven days, or on

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[1] Criminal Justice Administration Act, 1914, s. 27.
[2] 8 Edw. VII. c. 67, ss. 95 *et seq.* [3] 1921, J.C. 75. [4] 1921, J.C. 61.

special cause shewn, fourteen days (s. 24). The accused may be either liberated, with or without bail, or committed to prison; but no judge can allow bail in a case which he is not competent to try (*ibid.*).

Subsection (12).—*Remit to Higher Court.*

673. When an accused person is brought before a Court of summary jurisdiction, other than the Sheriff Court, charged with one of the serious crimes enumerated in s. 8 of the 1908 Act, or charged with an offence which the Court in the circumstances thinks more suitable for trial in a higher Court, he may be committed to prison for examination, for a period not exceeding four days (ss. 8 and 9). This may occur either as a result of preliminary investigation or in the course of the trial. The prosecutor must give notice to the Procurator-Fiscal of the county, or other official entitled to take cognisance of the case, in order that the accused may be dealt with according to law (s. 9). The committal may proceed upon a petition and warrant in the form furnished in Schedule F. Accused may be detained in custody otherwise than in prison, *e.g.* in police cells legalised for the purpose before the passing of the 1908 Act.[1] Care should be taken to see that remit is craved and granted to a competent jurisdiction.[2]

Subsection (13).—*Precognition.*

674. Where a public prosecutor wishes to cite witnesses for precognition in regard to any offence competent for trial in the Court for which he acts, he may apply by petition in the form of Schedule F for warrant of citation. The judge, if he deems it expedient, may grant such warrant, whether or not any person has been charged with the offence (s. 21). If the witness after due citation on at least twenty-four hours' notice fails, without reasonable excuse, to attend to give, or refuses to give, information within his knowledge in regard to the case, he is liable to a penalty not exceeding £3, or imprisonment not exceeding twenty days (s. 36). This penalty, it is suggested, could only appropriately be recovered upon a complaint served upon the recalcitrant witness. It has been stated to be the duty of every good citizen to give his aid, either to the Crown or to the defence, in every case where the interests of the public in the punishment of crime, or the interests of a prisoner charged with crime, call for ascertainment of facts.[3]

Section 5.—The Complaint.

675. The complaint is the document in which the charge against an accused person who is subject to the jurisdiction of a summary Court is formulated, and the medium whereby the Court is informed of the

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[1] 9 Edw. VII. c. 28, s. 2. [2] *O'Donnell and Ors.* v. *M'Kenna*, 1910, 6 Adam 242.
[3] Lord Justice-Clerk Macdonald in *H.M. Adv.* v. *Monson and Anr.*, 1893, 1 Adam 114, at p. 135.

alleged commission of an offence. The form of complaint in all Courts of summary criminal jurisdiction in Scotland, and the rules which apply to its framing, are provided by the 1908 Act, and the incorporated clauses of the Criminal Procedure (Scotland) Act, 1887.[1] A complaint may be either in writing or printed, or partly written and partly printed, on one sheet, or on separate sheets attached to each other.[2]

Subsection (1).—*General Form.*

676. The form of complaint is provided in Schedule C,[3] and is applicable to offences either at common law or under statute, the only difference being that in the latter case the statutory penalty has to be indicated either by a reference to the penalty clause or by being specifically set forth. The following are examples of both charges:—

(i) *Common Law Crime.*

Under the Summary Jurisdiction (Scotland) Act, 1908.

In the Sheriff Court of the Lothians and Peebles at Edinburgh.

The Complaint of A. B., Procurator-Fiscal.

Donald M'Tavish, presently in custody, you are charged at the instance of the complainer that on 30th October 1926, from a motor-car then standing in the grounds at 15 Wester Coates Terrace, Edinburgh, you did steal a travelling-rug; And you have been previously convicted as in the List annexed.

List of Previous Convictions Applying to You.

Date.	Place of Trial.	Court.	Offence.	Sentence.
1912, Sept. 19 1917, Dec. 7	Glasgow Do.	Police Sheriff	Theft Fraud and attempted fraud	30 days 60 days

A. B., Procurator-Fiscal.

(ii) *Statutory Contravention.*

Under the Summary Jurisdiction (Scotland) Act, 1908.

In the Sheriff Court of the Lothians and Peebles at Edinburgh.

The Complaint of A. B., Procurator-Fiscal.

George Main, motor-cab driver, 5 Blank Street, Edinburgh, you are charged at the instance of the complainer that on 24th December 1925, in York Place, Edinburgh, you did drive a motor-cab negligently on the wrong side of the street and collide with and damage an electric tram-car, then under the charge of James Sim, electric-car driver, 1 West Montgomery Place, Edinburgh, and an electric lamp standard; Contrary to the Motor-Car Act, 1903, s. 1; and such offence is a

[1] 50 & 51 Vict. c. 35. [2] 1908 Act, s. 42. [3] *Ibid.*, s. 18.

second offence, you having been previously convicted as in the List annexed; whereby you are liable to a fine not exceeding £50, and, in default of payment, to imprisonment in terms of the Summary Jurisdiction (Scotland) Act, 1908, s. 48.

List of Previous Convictions Applying to You.

Date.	Place of Trial.	Court.	Offence.	Sentence.
1922, Nov. 21	Edinburgh	Sheriff	Con. Motor-Car Act, 1903, s. 1	Fined £1

A. B., Procurator-Fiscal.

It will be convenient to deal with the constituent parts of the complaint in the immediately following subsections.

Subsection (2).—*Constituent Parts.*

(i) *Heading.*

677. "Under the Summary Jurisdiction (Scotland) Act, 1908." The purpose of the heading is to indicate the statute regulating the procedure which will govern the hearing and trial of the case. The invocation of the statute obviates the need for specific reference to such provisions contained therein, as *e.g.* the power conferred on the Court to mitigate penalties, to award imprisonment in default of payment of fine, or to substitute a fine for imprisonment, and the like.[1] It may be pointed out that it is wrong practice to add to the heading the title of the Act of Parliament under which the charge is laid. The heading has nothing to do with the charge. Similarly, it is wrong practice to include in the formulation of the charge a citation of the statute which confers jurisdiction upon the particular Court to try the offence. This has been held to be unnecessary.[2]

(ii) *Title of Court.*

678. The name of the Court and the place where it sits are specified, *e.g.* "In the Justice of the Peace Court of the County of Edinburgh at Edinburgh."

(iii) *Instance.*

679. It is imperative that the name, designation, and official title (if any) of the person at whose instance the prosecution is instituted should be correctly stated in the complaint. In cases in which the consent of the Home Secretary or of some official or authority is a condition precedent of proceedings, the complaint should bear that

[1] *M'Leod* v. *Tarras*, 1892, 3 White 339; *MacEwen* v. *Abinger*, 1894, 1 Adam 314.
[2] *Maclaren* v. *Macleod*, 1913, 7 Adam 102.

the prosecution has the requisite consent.[1] When the concurrence of the public prosecutor is necessary, the words "with concurrence of the Procurator-Fiscal of Court" are added to the instance. Concurrence is proved by a holograph minute written on the complaint by the Procurator-Fiscal, *e.g.* "Edinburgh, 30th September 1927.—I concur in the foregoing complaint.—A. B., Procurator-Fiscal." The want of concurrence, when it is necessary, vitiates the whole proceedings, and cannot be supplied by amendment.[2]

(iv) *Statement of Charge.*

680. This is the most important and most troublesome part of a complaint. It proceeds in the second person, as in an indictment, and its essential divisions will be seen from the forms furnished. The general rules for the statement of a summary criminal charge, common law or statutory, are—(*a*) to set forth in plain and simple language the acts which the accused person is charged with doing, attempting, or omitting to do, at a specified time and place; (*b*) in so doing, to make sure that the acts described constitute an offence punishable on summary complaint, either at common law or under the provisions of a specified section of an Act of Parliament; [3] (*c*) to furnish a specification of facts sufficient to give the accused person fair notice of the case he is called upon to meet; [4] and (*d*) to avoid charging the same person with two separate offences arising out of the same *species facti*, *i.e.* the same circumstances of time, place, and mode.[5] The prosecutor in libelling his charge may use any of the short forms of Schedule C of the 1908 Act, or Schedule A of the 1887 Act, so far as the latter are applicable to charges which are punishable on summary complaint. Where no forms are supplied he has to frame his own charge, when no further specification is required of him than a specification similar to that given in these forms (s. 19). This provision has had the effect of greatly shortening and simplifying complaints.

681. Numerous provisions of the 1908 Act regulate the manner of stating a summary criminal charge, and these may be digested as under:—

Naming Accused.—It is sufficient to describe him by his name and ordinary address; a statement is implied that he was "now or lately" residing at such address (s. 8 and Sched. B, ss. 4 and 13). If he answers to the name under which he is charged when the complaint is called, he cannot later challenge it as incorrect.[6]

Nomen juris is unnecessary; it is sufficient that the complaint sets forth facts relevant and sufficient to constitute an offence punishable on summary complaint (Sched. B, s. 5).

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[1] *Stevenson* v. *Roger*, 1914, 7 Adam 571.
[2] *Lundie* v. *MacBrayne*, 1894, 1 Adam 342.
[3] *Buist* v. *Linton*, 1865, 5 Irv. 210.
[4] *Drummond* v. *Macmillan*, 1896, 2 Adam 193.
[5] *Scott* v. *Anderson*, 1866, 5 Irv. 285; *Moore & Co.* v. *Wilson*, 1903, 4 Adam 231.
[6] *Poli* v. *Thomson*, 1910, 6 Adam 261.

Plural Accused.—A statement is implied that "both and each or one or other," or "all and each or one or more" of the accused committed the offence charged (Sched. B, s. 6).

Art and Part.—A statement is implied that accused is charged as being "guilty, actor or art and part" (Sched. B, s. 7).

Qualifying Words.—An allegation that any act of commission or omission charged in the complaint was done or omitted "wilfully," "maliciously," "wickedly and feloniously," "falsely and fraudulently," "knowingly," "culpably and recklessly," "negligently," or "in breach of duty," and such words as "knowing the same to be forged," "having good reason to know," "well knowing the same to have been stolen," or similar qualifying words, are implied, when the insertion of such allegation or words is necessary in order to make the complaint relevant (Sched. B, s. 8).

Quotation of Statutes is unnecessary; it is sufficient to allege that the offence was committed contrary to an Act of Parliament, and to refer to the section founded on,[1] or where the offence is created by more than one section, to the leading section or one of the leading sections.[2] But a leading section must always be specified, otherwise the complaint will not be relevant.[3]

Time.—A statement is implied that accused committed the offence on the date libelled, or on one or other of the days of the same month, or of the month immediately preceding, or of the month immediately following, except where an exact time is of the essence of the charge (Sched. B, s. 10); as *e.g.* in night-poaching cases, or offences which are only constituted offences through being committed on a specific day, such as Sunday.

Place.—A statement is implied that the accused committed the offence at the place libelled, or "at or near," "in or near," or "in the near neighbourhood of" such place, except where the actual place is of the essence of the charge (*ibid.*); as *e.g.* where an offence is libelled, under the Licensing Acts,[4] as committed in licensed premises, or, under the Street Betting Act, 1906,[5] as committed in a "street" or "public place," as defined by the Act.

Quantities, Persons, Things, and Modes.—The words "or thereby," "or part thereof," "or some other quantity to the prosecutor unknown," or similar words, are implied as qualifying all statements of quantities, or as to the details of acts (Sched. B, s. 11).

Description of Property.—It is unnecessary to state to whom property mentioned in the complaint belonged; a statement that it was not the property of the accused is implied in all cases where such implication is essential to criminality (Sched. B, s. 12).

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[1] 1887 Act, s. 9.
[2] 1908 Act, s. 19 (2).
[3] *Macrorie* v. *Bird*, 1911, 6 Adam 527; contrast *Tighe* v. *Wilson*, 1912, 7 Adam 46.
[4] 1903 to 1921.
[5] 6 Edw. VII. c. 43.

Description of Person.—It is sufficient to describe a person by his name and ordinary address; a statement is implied that he "now or lately" resided at such address (Sched. B, s. 13).

Description of Article.—It is sufficient to describe an article in general terms, without specifying materials or distinguishing particulars, unless such particulars are essential to the constitution of the crime charged (*ibid.*).

Money.—The word "money" includes current coin of the realm, Post Office orders, postal orders, and bank notes; it is sufficient to state that a sum to which reference is made consisted of "money" without specifying details (Sched. B, s. 14).

Documents need not be quoted; it is sufficient to refer to a document by a general description, adding where necessary "which is produced herewith," there being no list of productions annexed to a complaint (Sched. B, s. 15).

Reset.—It is sufficient to set forth simply that the property received by the accused had been dishonestly appropriated by theft, or by breach of trust and embezzlement, or by falsehood, fraud, and wilful imposition, as the case may be, without details of the particular crime (Sched. B, s. 58).

Previous Convictions.—The method of libelling previous convictions as aggravations is shewn in the form of complaint contained in the 1908 Act, Schedule C, and, though not made mandatory, should be followed.

Alternative Findings as to Guilt.—The necessity for alternative statements of charge is often obviated by the statutory provisions on this point.[1]

Echoing Words of Statute.—The description of an offence in the words of the statute or order contravened, or similar words, is sufficient (s. 19 (1)). It should be noted, however, that it does not necessarily follow that this will in all cases suffice to meet the requirements as to specification referred to above.[2] There have been cases where complaints which have echoed the words of statute were yet held irrelevant.[3] As Lord Low said in the case of *Renton* v. *Ramage*,[4] "there may be an offence framed in such general terms that it would not be fair to libel the offence in similar general terms, and in such a case it might well be necessary to give such particulars as would afford fair notice of what was charged."[5] The tendency, however, in the most recent cases is for the High Court to sustain the relevancy of complaints where only the words of statute are used.[6]

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[1] See *infra*, para. 703, "Alternative Findings."

[2] See *supra*, para. 680, "Statement of Charge."

[3] *Allan* v. *Howman*, 1918, J.C. 50.

[4] 1910, 6 Adam 266.

[5] See also the opinions of Lords Ardwall and Salvesen in *Dunn* v. *Mitchell*, 1910, 6 Adam 365.

[6] *Yeudall* v. *Baird & Co.*, 1925, J.C. 62; *Watson* v. *Ross*, 1920, J.C. 27; *Strathern* v. *Burns*, 1921, J.C. 92.

Implied Circumstances Affecting a Statute or Order.—A statement that an act was done, or omitted to be done, "contrary to" a statute or order (including bye-law [1]), implies a statement that such statute or order applied to the circumstances, that the accused was bound to observe the same, that any necessary preliminary procedure had been duly gone through, and that all the circumstances necessary to a contravention existed; and further, that such order was duly made, confirmed, published, and made effectual, and was in force at the time and place libelled (s. 19 (2)).

Exceptions, Exemptions, Provisos, Excuses or Qualifications, which may be pleaded in rebuttal of a charge, need not be specified or negatived in the complaint (s. 19 (3)).

Common-Law Crimes and Statutory Offences may competently be included in one complaint (s. 19 (4)).

Value of Stolen Property.—A statement that the value of property dishonestly appropriated does not exceed £10 is implied in every complaint instituted in the Justice of Peace, Burgh, and Police Courts, whose power to deal with offences inferring dishonest appropriation of property is limited to cases in which the property value does not exceed that figure (s. 19 (7)).

Specification of Penalties.—A complaint charging a contravention of a statute or order must conclude thus—"whereby you are liable to the penalties set forth in said section," or in "section . . . of said Act," or otherwise; or, if preferred, the penalties may be shortly set forth (Sched. C). It should be noted, however, that where a prosecutor chooses to set forth the penalties he must do so fully and accurately.[2] In view of the specialties affecting the disposal of children and young persons, as *e.g.* by the substitution of custody in a place of detention,[3] or committal to the care of a relative or other fit person,[4] for imprisonment, it is good practice, in charges against youthful offenders, to add to the specification of penalties the words, "subject to the provisions of the Children Act, 1908, s. 107." [5]

(v) *Signature.*

682. A complaint is signed by the prosecutor, or by a law agent on behalf of a prosecutor other than the public prosecutor of a Court (s. 18). Any law agent may appear for, and conduct a prosecution on behalf of, a prosecutor other than such public prosecutor (*ibid.*). This provision seems to meet the difficulty raised in *Thomson* v. *Scott* [6] and *M'Murdo* v. *M'Cracken.*[7] The character in which a person signs is added to his signature—*e.g.* "Procurator-Fiscal," "Complainer," or "Agent for Complainer."

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[1] 1908 Act, s. 5. [2] *M'Leod* v. *Tarras*, 1892, 3 White 339; *Reid* v. *Miller*, 1899, 3 Adam 29.
[3] Children Act, 1908, s. 106. [4] *Ibid.*, s. 58 (7).
[5] See *infra*, para. 720, "Youthful Offenders." [6] 1901, 3 Adam 410. [7] 1906, 5 Adam 164.

Section 6.—Trial.

Subsection (1).—*Record.*

683. Proceedings under the 1908 Act are conducted summarily *viva voce*, and, except where otherwise provided, no record of the proceedings need be kept other than (*a*) the complaint; (*b*) the plea; (*c*) a note of objections to competency or relevancy, or to competency or admissibility of evidence if either party desires such note; (*d*) a note of any documentary evidence produced; and (*e*) the conviction and sentence or other finding of the Court (s. 41). The proceedings may be in writing or printed, or partly written and partly printed, on the same sheet or on separate sheets attached (s. 42).[1] Forms will be found in Schedule E. Although at one time the question of what constituted documentary evidence was a vital one, since failure to meet the statutory requirement to note same was invariably fatal to the maintenance of a conviction, it has now become largely academic, since the High Court determined [2] that such failure did not amount to "incompetency" within the meaning of s. 75 of the 1908 Act, and was therefore not a ground for quashing a conviction.

684. With a view, however, to assist accuracy in recording, reference may be made to certain illustrative decisions of the High Court. The following are documents which the High Court of Justiciary has held required to be noted, viz.: an alleged false return on which a prosecution under the Lands Valuation Act, 1854, was based: [3] a plan produced and put in evidence (as distinct from one used merely to illustrate evidence that would have been complete without it); [4] a letter produced and read in Court and put to a witness in cross-examination as written by her; [5] and the execution of citation of an accused person against whom trial was allowed to proceed in absence.[6] But, on the other hand, the following have been held not to require noting, viz.: bank notes constituting property stolen and produced merely for identification; [7] business books used by a witness merely to refresh his memory; [8] and a police book containing the charges against the accused which during the trial his agent asked, and was allowed, to see.[9]

Subsection (2).—*Accused Absent.*

685. If the complaint has been duly served, and the accused fails to appear at the appointed diet, the Court may (*a*) adjourn the diet,

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[1] The need for care in attaching is illustrated by the case of *Connell* v. *Mitchell*, 1912, 7 Adam 23.

[2] *Silk* v. *Middleton*, 1921, J.C. 69.

[3] *Oliphant* v. *Wilson*, 1889, 2 White 403.

[4] *Strachan* v. *Watson*, 1893, 1 Adam 55.

[5] *Avery* v. *Hilson*, 1906, 5 Adam 56.

[6] *Powdrell* v. *Galloway*, 1904, 4 Adam 432.

[7] *Jacobs* v. *Hart*, 1900, 3 Adam 131.

[8] *Marshall* v. *Phyn*, 1900, 3 Adam 262.

[9] *Reid* v. *Neilson*, 1907, 5 Adam 401. Notes taken by police officers to enable them to report to their superiors, but not used or referred to by them in the witness-box, cannot be called for as a production. See *Hinshelwood* v. *Auld*, 1926, J.C. 4.

appointing intimation to be made to the accused, which may be given either by registered letter or by an officer; (*b*) on the motion of the prosecutor, and on proof of citation or of due intimation of the diet,[1] proceed to trial, but only if the accused is charged with a statutory offence involving the imposition in the first instance of a pecuniary penalty only, or if the statute founded on, or conferring jurisdiction, authorises procedure in the absence of the accused; (*c*) grant warrant to apprehend; or (*d*) on the motion of the prosecutor forfeit bail or penalty, and, if desired, grant warrant to apprehend (s. 33). Service of a complaint is proved by the oath of the officer who served it, or by his written execution (s. 25). Intimation to accused is proved by the receipt for the registered letter, or by the officer's execution (s. 33). Where the case proceeds to trial under (*b*). *supra*, some points call for consideration. When the Court disposes of a case in the absence of the accused, the charge must be established by evidence, unless the statute founded on authorises conviction in default of appearance (*ibid.*). In the cases falling within the category described, but in no others, it is in the discretion of the Court to allow a law agent to appear, plead for and defend accused, on production of proper authority; or even to allow a plea to be tendered for accused by any person duly authorised by him, provided the plea is one of guilty (*ibid.*). Where from any cause a diet for trial has to be continued from day to day, it is not necessary to intimate to accused such continuation (*ibid.*).

Subsection (3).—*Plea of Guilty.*

686. If the accused appears, the complaint or the substance of it is read to him (s. 29). The accused is asked if he pleads guilty or not guilty. If he pleads guilty to the charge, or a part thereof accepted by the prosecutor, he does not sign the plea; it is recorded and signed by the judge or clerk of Court (s. 31). If there is any previous conviction libelled, the judge or clerk asks the accused if he admits its correctness and application to him. If he does so, the plea is held to be a plea of guilty as libelled, and is so recorded; if he does not, the prosecutor may either withdraw the conviction or prove it at the first or any adjourned diet (s. 34). The plea and sentence may be combined, in which case one signature by judge or clerk is sufficient to authenticate both (s. 31 and Schedule E) thus:—

"Compeared the accused, and, in answer to the complaint, pled guilty to the first charge, and was sentenced to sixty days' imprisonment.

C. D."

Subsection (4).—*Plea of Not Guilty.*

687. If the accused is to plead not guilty, he may after the complaint is read over as before mentioned, and before pleading, state objections to

[1] For an instructive case as to procedure see *Powdrell* v. *Galloway*, 1904, 4 Adam 432.

the competency or relevancy of the complaint or proceedings (s. 29). No such objections can be allowed at a future diet, unless on cause shewn (*ibid.*). There is no such thing as a proof before answer in a criminal trial.[1] A person, or his law agent, appearing to answer to a complaint, cannot plead want of due citation, or informality in the citation or execution (s. 29). Where the accused is represented by a law agent, no review is permitted in respect of objections to the proceedings unless these are timeously stated at the trial (s. 75), but the High Court has maintained its right to deal with cases in which, although no objection to the relevancy was taken in the Court below, there is patent, and disclosed on the face of the proceedings, an irrelevancy which makes the proceedings fundamentally null.[2] If accused is charged as acting in a special capacity, *e.g.* as the holder of a licence, and intends to deny the fact, he must challenge the statement before his plea is recorded (s. 19 (5)).

688. The complaint may have to be amended,[3] or abandoned,[4] or the hearing adjourned.[5] If not, the plea of not guilty is then recorded, and, either at the same diet or at an adjourned one, evidence is led, first for the prosecution and then for the defence, with the proviso, however, that, in certain circumstances, witnesses for the defence may be taken before those for the prosecution.[6] An accused person may, if he so elects, give evidence on his own behalf, the procedure being regulated by the Criminal Evidence Act, 1898.[7] After the case for the prosecution has been closed no further evidence can be led in support of the complaint. It is well established that proof in replication is not permissible in a criminal court.[8] It is, however, open to a judge of his own motion to recall a witness and ask him any question he may deem necessary, even after the case for both parties has been closed.[9] He may not, however, after completion of the evidence, seek information from any person in Court who has not been examined as a witness,[10] nor should he let his mind be influenced by anything outside the evidence led in the case, as, *e.g.* by a visit to the *locus* outwith the presence of the parties.[11] On the completion of the evidence parties are heard, if they wish to address the Court. The fact that the accused, or the wife or husband of the accused, as the case may be, has not given evidence may not be made the subject of comment by the prosecution.[12]

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[1] *Phillips* v. *Currie*, 1901, 3 Adam 370.

[2] *O'Malley* v. *Strathern*, 1920, J.C. 74 and cases there cited.

[3] See para. 690, *infra*. [4] See para. 691, *infra*. [5] See para. 692, *infra*.

[6] See para. 694, *infra*. [7] 61 & 62 Vict. c. 36.

[8] Per Lord Dundas in *Docherty and Anr.* v. *M'Lennan*, 1912, 6 Adam 700.

[9] *Collison* v. *Mitchell*, 1897, 2 Adam 277; and *Saunders* v. *Paterson*, 1905, 4 Adam 568.

[10] *Leavack* v. *Macleod*, 1913, 7 Adam 87.

[11] *Sime* v. *Linton and Anr.*, 1897, 2 Adam 288. It is, of course, quite proper to visit the *locus* in presence of the parties in the course of the trial. For illustrations of other ways in which the conduct of magistrates has been challenged see *Niven* v. *Hart*, 1898, 2 Adam 562; *Cochran* v. *Walker*, 1900, 3 Adam 165; and *Aitken* v. *Wood*, 1921, J.C. 84.

[12] Criminal Evidence Act, 1898, s. 1 (*b*). It has been held, however, that a judge is not under the same restriction, *Brown* v. *Macpherson*, 1918, J.C. 3.

689. When an accused person is without professional advice or assistance, both in the case when there is a plea of guilty, and in that in which there is a finding of guilty after evidence, it is the duty of the judge to give him an opportunity of making any statement he may desire to make on his own behalf.[1] Judgment is thereafter pronounced. If the Court consists of more than one judge, and the judges are equally divided in opinion, the accused is found not guilty (s. 40).

Subsection (5).—*Amendment of Complaint.*

690. It is competent at any time prior to the determination of the case, unless the Court see just cause to the contrary,[2] to amend the complaint by deletion, alteration, or addition, so as to cure any error or defect therein, or to meet any objections thereto, or to cure any discrepancy or variance between the complaint and evidence, provided such amendment does not change the character of the offence charged (s. 30). The amendment is authenticated by the initials of the clerk. The Court may grant remedy to the accused by adjournment or otherwise, if of opinion that he may be prejudiced in his defence on the merits by such amendment (*ibid.*). Decisions given under the former law, which was very similar, determined, *inter alia*, that the addition of a new *locus* was incompetent;[3] that the deletion of a *locus* was incompetent;[4] that alteration might be made in the date of an offence;[5] and that a defective instance could not be cured by amendment.[6]

Subsection (6).—*Abandonment of Proceedings.*

691. If the prosecutor wishes to abandon proceedings, he can do so in various ways. (*a*) He may move the Court to allow him to desert the diet *pro loco et tempore*, in which case he can renew proceedings under a fresh complaint.[7] (*b*) He may move to desert the diet *simpliciter*, in which case he can take no further proceedings on the same charge.[8] (*c*) He may simply not call the complaint, in which case the complaint drops, without prejudice to further procedure on a new complaint.[9] (*d*) He may move the Court to allow him to withdraw the complaint, in which case he may proceed upon a fresh one.

Subsection (7).—*Adjournment.*

692. Every judge has right to adjourn a trial, or to refuse to do so, at his discretion, and the High Court will not interfere, unless the power

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[1] *Ewart* v. *Strathern*, 1924, J.C. 45.

[2] The High Court will not interfere with the discretion of the inferior judge, unless the public interest, of that of the accused, is likely to suffer; *Cumming* v. *Frame*, 1909, 6 Adam 57.

[3] *Stevenson* v. *M'Levy and Ors.*, 1879, 4 Coup. 196.

[4] *Henderson* v. *Callendar*, 1878, 4 Coup. 120.

[5] *Macintosh* v. *Metcalfe*, 1886, 1 White 218.

[6] *Lundie* v. *MacBrayne*, 1894, 1 Adam 342.

[7] *H.M. Adv.* v. *Hall*, 1881, 4 Coup. 500; *Collins* v. *Lang*, 1887, 1 White 482.

[8] *H.M. Adv.* v. *Hall, supra.*

[9] *Cochran* v. *Walker*, 1900, 3 Adam 165.

is used oppressively.[1] There is special risk in refusing adjournment in the case of children.[2] There must always be a written minute, signed by the judge or clerk, containing a specified time and place for the adjourned diet.[3] As already stated, when the accused fails to appear, an adjournment is competent (s. 33). It is also permitted, on the motion of either party, when the accused pleads not guilty (s. 32 (1)). A date must be fixed as early as is consistent with the just interests of both parties (s. 32 (2)). If the accused has not already got a copy of the complaint (*e.g.* when he has been apprehended), the prosecutor must furnish one, if desired (*ibid.*). If accused has been apprehended, he is entitled to an adjournment for not less than forty-eight hours, provided he makes the request before proof has been begun; and the Court must, in every case where the accused pleads not guilty, inform him of this right (s. 32 (3)). Failure on the part of the Court to give this intimation, when necessary, will be regarded as a ground for setting aside a conviction.[4] The adjournment may be for less than forty-eight hours, if necessary to secure evidence otherwise not available (s. 32 (3)). The grant of an adjournment in the case of an accused person who has not been apprehended but answers a citation is not imperative, but a matter for the Court's discretion.[5] When the Court has allowed amendment of the complaint which may result in prejudice to an accused person's defence, adjournment must be granted (s. 30). On adjournment, when accused is in custody, he may be committed to prison with or without bail, or liberated under a penalty not exceeding £10 in case he shall fail to appear (s. 32 (4) and (5)). In the case of a youthful offender under the age of sixteen, the provisions of the Children Act, 1908,[6] must be kept in mind.

Subsection (8).—*Alibi.*

693. If an accused person intends to establish the special defence of *alibi* he must give notice to the prosecutor, with particulars of time, place, and witnesses, prior to the examination of the first witness for the prosecution (s. 35). It will be prudent to give earlier notice, because the prosecutor, if he thinks the notice too short, can obtain an adjournment (*ibid.*). Nothing is said in the Act as to the manner in which notice is to be given, but it is certainly not necessarily in writing, and any informal intimation, which supplies the needful particulars, will probably be accepted. One must not demand the precision of a jury trial in summary procedure.

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[1] 1908 Act, s. 32 (6); *Bruce* v. *Linton*, 1860, 23 D. 85; *Robertson* v. *Duke of Athole*, 1869, 1 Coup. 348; *Haining and Anr.* v. *Milroy*, 1893, 1 Adam 86.

[2] *Gray* v. *M'Gill*, 1858, 3 Irv. 29; *Jamieson and Ors.* v. *Mackay*, 1862, 4 Irv. 246; *M'Ginnes* v. *Neilson*, 1910, 6 Adam 221.

[3] *Anderson and Fraser*, 1852, 1 Irv. 1; *Corstorphine* v. *Jameson*, 1909, 6 Adam 154; but contrast *M'Intyre* v. *Linton*, 1876, 3 Coup. 298; and *Tocher* v. *H.M. Adv.*, 1927, J.C. 63.

[4] *Massey* v. *Lamb*, 1906, 5 Adam 59.

[5] *Mackie* v. *Crombie*, 1926, J.C. 29.

[6] 8 Edw. VII. c. 67, s. 97.

SUBSECTION (9).—*Special Provisions affecting Evidence.*

694. While it is unnecessary to discuss here the general rules of evidence, certain special matters introduced by the 1908 Act must be mentioned briefly. These in the main are provisions devised to speed up procedure in summary cases, and to minimise the chances of convictions being upset on technicalities. In supplement of the common law power [1] which magistrates have to punish summarily contempt of the Court or of the jurisdiction of the Court, the Act constitutes this a statutory offence. Thus a witness who fails to attend after due citation, or who refuses to be sworn, or to answer questions, or to produce documents, or who prevaricates, is to be deemed guilty of contempt of Court, and may be summarily punished forthwith therefor by a penalty not exceeding £3, or imprisonment not exceeding twenty days, the clerk being directed to minute the acts constituting the contempt, or statements forming the prevarication (s. 36). The penalty may be recovered by a separate complaint,[2] and this will usually be the better course. Where the same witness has to be repeatedly examined at the same diet in separate cases under the same statute (*e.g.* an Education Authority officer in charges under the Education Acts), he need not be sworn on each occasion, but is simply reminded by the judge that he is still on oath (s. 37). If the accused is likely to lose the benefit of witnesses unless they are examined at once (as occasionally happens in maritime and similar cases), they may be examined before the evidence for the prosecution has been led, but the accused is entitled to lead further evidence after the case for the prosecution is closed (s. 32 (8)).

695. A letter, minute, or document, issuing from a Government office, is *prima facie* evidence of the matters contained in it, and need not be sworn to by any witness (s. 38 (1)).[3] A properly certified copy is held equivalent to the original, without proof of signature (*ibid.*). An order by a department of state or government, a local authority, or a public body, acting under statutory powers, or a copy of such order, is received as evidence of the due making, confirmation, and existence of the order, without further proof; but it may be challenged as *ultra vires*, or on any other competent ground (s. 38 (2)).[4] Such order need not be noted in the record as a documentary production (*ibid.*). The term "order" means order, by-law, rule or regulation having statutory authority (s. 2). The important point has more than once arisen whether such an order as above referred to requires to be produced by the prosecutor and put in evidence at the trial. A High Court full bench case [5] decided that Defence of the Realm (Liquor Control) Regu-

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[1] Ersk. Inst. i. 2, 8; Hume, ii. 138; Macdonald, p. 426.
[2] 1908 Act, s. 36, and see *Petrie* v. *Angus*, 1889, 2 White 358.
[3] See *Stevenson* v. *Roger*, 1914, 7 Adam 571.
[4] See *Brander* v. *Mackenzie*, 1915, 7 Adam 609.
[5] *Macmillan* v. *M'Connell*, 1917, J.C. 43.

lations and an order of the Central Control Board (Liquor Traffic) did not require to be produced by the prosecutor at a trial in a prosecution taken under them, the *ratio decidendi* being that they formed part of the general law of the land and were presumed to be known by everyone. As pointed out by Lord Anderson,[1] this decision would seem logically to make it unnecessary for a prosecutor to prove or produce the by-laws of any public body, promulgated under legislative sanction and published in the prescribed mode.

696. It is unnecessary to establish a charge, or part of a charge, to which the accused pleads guilty (s. 32 (7)). This applies to the case of several charges, part of which the accused admits and part denies. It is unnecessary to prove a fact, or a document, admitted by the opposite party, but no admission can be accepted from an accused person who has no legal assistance in his defence (s. 39). The method of admission is preferably by written minute signed by the party or his agent (*ibid.*). The prosecutor does not require to lead proof in relation to any exception, exemption, proviso, excuse, or qualification applicable to an offence under a statute or order, but the accused may prove it as applicable to himself (s. 19 (1)). Thus where an accused person was charged that she "did without a licence certificate sell exciseable liquors" in contravention of the Licensing (Scotland) Act, 1903, s. 65, it was held that the prosecutor was relieved from the necessity of proving non-possession of a licence, it being open to her to allege and prove that she had such a certificate.[2] Where an offence is alleged to have been committed by accused in a certain special capacity, as holder of a licence, master of a vessel, occupier of a house, or the like, the fact that he possesses the qualification is held as admitted without proof, unless challenged before his plea is recorded (s. 19 (5)). Should the prosecutor, however, omit at the trial to found upon this implied admission, and set out to prove the qualification, he cannot thereafter, on the failure of his proof, avail himself of the statutory privilege.[3] In a case under the Merchant Shipping Acts, the nationality of a ship as stated in the complaint is presumed without proof, in the absence of evidence to the contrary (s. 19 (5)). It is not necessary to prove all the particulars set forth in a complaint in regard to the identity of any person, place, or thing, if the evidence led is sufficient to prove such identity (Schedule B, s. 68).

Subsection (10).—*Previous Convictions.*

697. It is a rule of the common law that any crime is aggravated by a previous conviction of the same crime.[4] The 1908 Act enacts that previous convictions of a statutory offence may be libelled as aggravations in a subsequent charge for the same kind of offence, or an analogous offence (s. 34 (7)). It should be noted, however, that it is not competent to libel a conviction of an offence against an

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[1] *Macmillan* v. *M'Connell*, 1917, J.C. 53.
[2] *M'Cluskey* v. *Boyd*, 1916, 7 Adam 742.
[3] *Archibald* v. *Plean Colliery*, 1924, J.C. 77.
[4] *Campbell*, 1822, Shaw (Just.) 66.

analogous statute as an aggravation of an offence charged under a different statute, for the purpose of raising what is really a first offence under the latter statute into a second or a second into a third.[1] There is a distinction "between making use of a previous conviction as a mere aggravation of an offence in the ordinary sense of the term 'aggravation,' and making use of it as a substantive part of a statutory offence."[2] In all cases of libelling previous convictions, the conviction must be prior in date to the commission of the offence under trial.[3] Convictions of certain classes of offence are also competent aggravations of any other offence of the same class, viz. offences inferring (1) dishonesty, (2) personal violence, (3) lewd conduct, (4) disorderly conduct, or (5) a breach of public order.[4] These convictions may have been obtained in any part of the United Kingdom (s. 34 (7)).

698. On a plea of guilty, or on conviction after a plea of not guilty, the accused is asked whether he admits the convictions libelled; if he does so, the admission is recorded; if he does not admit the convictions, the prosecutor may either withdraw them or prove them (s. 34). It is unnecessary for the prosecutor to produce an extract of any conviction that is admitted. A conviction, or an extract conviction, under the hand of the proper officer, is received as evidence without being sworn to by witnesses (*ibid.*). The application of a conviction to the accused is sufficiently proved by an official of any prison in which he may have been confined on such conviction, whether such official was present in Court at the trial or not (s. 34 (5)). In practice it is usually applied to the accused by the evidence of a single police officer who was present in court when the sentence was pronounced, though the basis of the practice seems to be more a matter of inference from the phraseology of the Procedure Acts[5] than the result of any direct authorisation. The case of *M'Dermott* v. *Stewart's Trs.*,[6] though argued on the footing that the foregoing is the legal procedure, rather casts a doubt upon it,[7] and it is thought that the evidence of two witnesses would be necessary save where the prison official is available. Entries of convictions taken from the official book of record of any Court, provided such are duly certified by judge or clerk, are accepted as evidence of the convictions in proceedings in that Court (s. 34 (5)). The particulars of previous convictions are entered in a schedule, and one extract proves all the previous convictions and aggravations therein set forth (s. 34).

699. It is competent to lead evidence of previous convictions *in causa*, where such evidence is competent in support of a substantive charge (s. 34). Illustrations may be found in cases where an accused person is charged as a "known thief" under the Burgh Police (Scotland)

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[1] *Hefferan* v. *Wright*, 1910, 6 Adam 321.
[2] *Ibid.*, per Lord Ardwall at p. 326.
[3] Macdonald, p. 13.
[4] 1887 Act, ss. 63, 64, 65; 1908 Act, ss. 5 and 34 (7).
[5] 50 & 51 Vict. c. 35, s. 66, and 8 Edw. VII. c. 7, s. 34 (5).
[6] 1918, J.C. 25.
[7] *Ibid.*, per Lord Mackenzie at p. 31.

Act, 1892,[1] or as coming within the equivalent of that category under the Prevention of Crimes Act, 1871,[2] or as a "cardsharper" under the Prevention of Gaming (Scotland) Act, 1869.[3] The conviction of a representative of a company or incorporation is held to be a conviction of the corporate body, and a relevant aggravation in a charge against the same incorporation, although a different representative is charged (s. 28 (2)), but it has been decided that it is not competent to libel a conviction obtained against a company charged in its corporate capacity as an aggravation of a later conviction obtained against the same company when charged through an individual representative.[4]

Subsection (11).—*Youthful Offenders.*

700. The Children Act, 1908,[5] contains a number of important provisions which define the procedure to be followed in the trial of youthful offenders under the age of sixteen. A Court of summary jurisdiction, when hearing charges against such persons, or dealing with applications relative to them which necessitate their presence, as *e.g.* under s. 58 of the Act, must sit either in a different building or room from the ordinary Court-room, or on different days or at different times from the ordinary sittings of the Court.[6] In the special Court thus constituted, which is known as the Juvenile Court, no person other than the members and officers of the Court, and the parties to the case, their solicitors and counsel, and other persons directly concerned in it, is, save by leave of the Court, allowed to attend.[7] This exclusion does not, however, apply to press representatives.[7] The Juvenile Court requirement does not hold where a person under sixteen is charged jointly with a person or persons over that age. In such case the ordinary Court is the appropriate tribunal.[6] Where a youthful offender under sixteen is charged with any offence, or a child under fourteen is the subject of an application for an order to send him to an industrial school, his parent or guardian must, if discoverable and resident reasonably near, attend at Court during all stages, unless the Court is satisfied that such a requirement would be unreasonable.[8] This does not mean that a legal citation must be served on the parent—a notice left for him will suffice.[9] The importance of the presence of a parent or guardian is emphasised by the powers conferred on the Court in suitable cases to penalise the parent instead of the child.[10]

701. Since a Court may not pronounce an order for the detention of a child in a certified industrial school without giving the local Education Authority (which is responsible for providing for the child's

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[1] 55 & 56 Vict. c. 55, s. 409.
[2] 34 & 35 Vict. c. 112, s. 7.
[3] 32 & 33 Vict. c. 87, s. 3.
[4] *Campbell v. Macpherson*, 1910, 6 Adam 394.
[5] 8 Edw. VII. c. 67.
[6] *Ibid.*, s. 111 (1).
[7] *Ibid.*, s. 111 (2).
[8] *Ibid.*, s. 98.
[9] *White and Ors.* v. *Jeans*, 1911, 6 Adam 489.
[10] Children Act, 1908, s. 99, and see para. 720, *infra.*

reception and maintenance there) an opportunity of being heard,[1] it is desirable to afford due notification to the Authority of the holding of all Juvenile Courts, or at least of such Courts as involve cases which may raise the question of committal to an industrial school. No child under fourteen, other than an infant in arms, is permitted to be present in Court during a criminal trial unless he is himself the accused or is in attendance as a witness, and, in the latter case, only while his presence is required in that capacity.[2]

Section 7.—Disposal of Case.

Subsection (1).—*Finding.*

702. The finding is the determination of the Court as to the guilt of the accused. It may be one of "guilty," "not guilty," or "not proven." The finding should be specific as to the extent to which the accused is guilty, for the Court may find part only of a charge proved.[3] In every case in which evidence has been led there must be a finding of guilt before sentence is passed.[4]

Subsection (2).—*Alternative Findings.*

703. Under ss. 59 to 62 of the 1887 Act, incorporated with the 1908 Act (s. 5), it is competent for the Court in certain cases of crimes inferring dishonesty to convict the accused of a crime other than that charged. Thus, where robbery, theft, embezzlement, or fraud is charged, the Court may convict of reset; where robbery, embezzlement, or fraud is charged, the Court may convict of theft; where theft is charged, it is competent to convict of embezzlement or fraud; and where theft is charged, it is competent to convict of theft, although the circumstances proved amount to robbery (s. 59). Where two or more crimes are charged cumulatively there may be a conviction of one or more of them. Where part of a charge constitutes in itself an offence punishable on summary complaint the Court may convict of such part: and where a particular intent or particular circumstance of aggravation is charged a conviction without such intent or aggravation may follow (s. 60). Where any crime is charged a conviction of attempt is competent, and where attempt only is charged there may be a conviction although the evidence is sufficient to prove the completed crime. Where the charge is of a crime importing serious personal injury it is competent to convict of assault with the aggravation that it was committed with intent to commit such crime (s. 61). Where the charge is of a statutory offence, which is also criminal at common law, the Court may convict of the common law crime: and where the facts proved do not amount to a contravention of the statute but amount to a crime at common law, the Court may convict of that common law crime (s. 62). In the latter case, however, it should be

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[1] Children Act, 1908, s. 74 (6).
[2] *Ibid.*, s. 115.
[3] 1908 Act, s. 58.
[4] *Sharp* v. *Todd*, 1892, 3 White 154.

noted that the common law crime must be one covered by the *species facti* set forth in the complaint.[1]

Subsection (3).—*Punishment.*

704. As regards crimes at common law, the Court may fix the punishment at its discretion, so long as it keeps within the limits of its powers.[2] As regards statutory contraventions, the Court may likewise in its discretion impose the penalties exigible under the particular Act of Parliament contravened, subject to a graduated scale of imprisonment laid down in the 1908 Act [3] where such is imposed as an alternative of fine or caution.

705. The Sheriff (but no inferior judge) is now empowered, in cases in which in his summary Court he convicts a person between sixteen and twenty-one of an offence for which he is liable to imprisonment, to pass a sentence of detention under penal discipline in a Borstal institution for not less than two or more than three years, provided that it appears to the Court that, by reason of his criminal habits or tendencies or association with persons of bad character, it is expedient to subject him to instruction and discipline which shall conduce to his reformation and the repression of crime. The machinery by which committal to Borstal may be made is provided by the Prevention of Crime Act, 1908,[4] as amended by the Criminal Justice Administration Act, 1914.[5]

Subsection (4).—*Mitigation.*

706. There are three ways in which the Court, after reaching a finding of guilt against an accused person, may mitigate the severity of the penalties which, either under its common law powers or under the statutes contravened, it can impose. (1) It may refrain from proceeding to conviction and deal with the offender under the Probation of Offenders Act, 1907; [6] (2) it may take advantage of any of the statutory powers of mitigation conferred by the 1908 Act; and (3) in cases where it imposes a fine or caution it may allow time for payment thereof. These methods are dealt with in the succeeding paragraphs.

(i) *Probation.*

707. Great importance is properly attached in the case of first offences, or trivial offences, and especially where young people are involved, to the desirability of avoiding the recording of a conviction, which might obviously have far-reaching future results. The Legislature has encouraged this view in the Probation of Offenders Act, 1907,[6] which superseded, with greatly widened provisions, the Probation of First

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[1] *Markland* v. *H.M. Adv.*, 1891, 3 White 21.
[2] See para. 653, *supra*.
[3] Sec. 48, and see *infra*, para. 720.
[4] 8 Edw. VII. c. 59, s. 1.
[5] 4 & 5 Geo. V. c. 58, s. 42 (8).
[6] 7 Edw. VII. c. 17.

Offenders Act, 1887,[1] familiarly known as "The First Offenders Act." By the Act of 1907 the Court, although the guilt of the offender may be established, either by his judicial confession or as the result of evidence adduced, is entitled in appropriate cases to refrain from proceeding to conviction, and to release him on probation. This may be done when the Court is of opinion, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which it was committed,[2] that it is inexpedient to inflict any punishment or any other than a nominal punishment. In such cases the Court may make an order either dismissing the charge or discharging the offender on his entering into a bond to be of good behaviour and to appear for conviction and sentence if called upon during the period fixed in the bond.[3] The conditions of the probation bond may include one which places the offender under the supervision of a probation officer, to whose directions as to conduct, residence, etc., he is bound to conform.[4]

708. Other sections of the Act of 1907 and also certain sections of the Criminal Justice Administration Act, 1914,[5] deal with the nature of the conditions which may be imposed, and provide the machinery for varying them, and also for dealing with the offender in the event of a breach of the probation bond being established, the Court in the latter case being empowered to convict and sentence for the original offence. This may be done by a magistrate other than the one who made the probation order, though it must be in the same Court.[6]

709. In a later subsection dealing with youthful offenders,[7] reference will be found to other methods of disposing of the cases of accused persons who come within that category, which are devised to secure the desired avoidance of a recorded conviction.

(ii) 1908 *Act Powers.*

710. As regards statutory contraventions tried under the Act where any of the following punishments are involved, viz. imprisonment with or without hard labour, a pecuniary penalty, caution for good behaviour or otherwise, either singly or along with imprisonment or fine, the Court has power to mitigate the punishment prescribed by the Act contravened as follows: (1) to reduce the period of imprisonment; (2) to impose imprisonment without hard labour; (3) to substitute for imprisonment a fine not exceeding £25, with or without caution for good behaviour, with imprisonment in default; (4) to substitute caution for fine or imprisonment; (5) to reduce the amount of any pecuniary penalty; (6) to dispense with finding caution (s. 43). It would be competent to reduce a fine even below a minimum stated in

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[1] 50 & 51 Vict. c. 25.
[2] See *Dunning* v. *Trainer*, 1909, 73 J.P. 400.
[3] 7 Edw. VII. c. 17, s. 1 (1).
[4] *Ibid.*, s. 2.
[5] 4 & 5 Geo. V. c. 58, ss. 8 and 9.
[6] *M'Intyre* v. *Henderson*, 1911, 6 Adam 433.
[7] See *infra*, para. 720.

the Act of Parliament which constitutes the offence.[1] But this power does not extend to reduction of the minimum fine stipulated by treaty with a foreign state; nor to proceedings under an Act relating to any of His Majesty's regular or auxiliary forces (s. 43). In these two instances the Court cannot reduce the statutory minimum. In place of imposing any punishment, the Court may in any case, whether at common law or under statute, dismiss the accused with an admonition (s. 46).

(iii) *Allowance of Time.*

711. In order to lighten the burden of a fine or caution, the Court may allow time for payment. This power as regards fines, which was permissive under the 1908 Act (s. 45), has now been superseded by a statutory direction under the Criminal Justice Administration Act, 1914,[2] making it compulsory for the Court to allow time for payment unless it is satisfied that the person fined is possessed of sufficient means to enable him to pay the sum forthwith, or unless, on being asked whether he desires time, he does not express any such desire, or unless he fails to satisfy the Court that he has a fixed abode within its jurisdiction, or unless the Court for any special reason is satisfied that no time should be allowed. The last exception may be illustrated by such cases as the following, *e.g.* where, during the currency of the period allowed for payment of an antecedent fine, the accused comes before the Court on a fresh charge, or where a person is fined for begging and the allowance of time might reasonably be expected to result in renewed begging in order to raise the fine. In all cases in which time is not allowed, the Court's reasons for refusal must be stated in the finding and sentence.[3] Where time is allowed, it must not be less than seven clear days,[4] and such period as is primarily fixed may be later extended [5] under machinery provided by Act of Adjournal dated 18th March 1915. Where the person allowed time appears to the Court to be not less than sixteen nor more than twenty-one, he may be placed under the supervision of a person appointed by the Court until payment of the sum adjudged to be paid; and the Clerk of Court in such a case, before issuing an extract of conviction and sentence, must again lay the complaint before the Court, and the latter is required to consider any report as to the offender's conduct and means which may be made by the person supervising.[6]

Subsection (5).—*Forms of Conviction and Sentence.*

712. The finding, sentence, and orders of Court, as regards offences both at common law and under statute, are minuted in the forms contained in Schedule E of the 1908 Act (s. 53). The same schedule supplies forms of bail bond and extracts, and also forms applicable

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[1] *Lambie* v. *Mearns*, 1903, 4 Adam 207.
[2] 4 & 5 Geo. V. c. 58, s. 42 (2).
[3] *Ibid.*, s. 42 (2) (*d*).
[4] *Ibid.*, s. 42 (2) (*b*).
[5] *Ibid.*, s. 42 (3).
[6] *Ibid.*, s. 42 (2) (*c*).

to procedure under the Probation of Offenders Act, 1907. Of these forms it may be observed, that as they have been reduced to the minimum of simplicity, the High Court will look for the maximum of accuracy in using them.[1] The Act itself is sufficient warrant for all execution, and for the clerk of Court to issue extracts for implement thereof (s. 53). Where imprisonment forms part of a judgment, warrant to apprehend and detain pending committal to prison is implied. Where a penalty is paid at the bar, it is not necessary to specify any imprisonment in default of payment. A *cumulo* penalty may be imposed in respect of all or any of the charges embraced in one complaint, whether these are of common law crimes or of statutory offences (*ibid.*); but when a *cumulo* sentence of imprisonment without option of fine was imposed in a case in which an accused person was convicted of (1) a common law offence, and (2) a statutory offence involving a pecuniary penalty only in the first instance, the sentence was held to be bad, and was corrected by the High Court by the addition of the imposition of a fine in respect of the statutory charge.[2] The sentence may be framed to take effect on the expiry of a previous sentence (s. 53). Sentence, unless otherwise provided by statute, must be pronounced in open Court in presence of the accused, but need not be written out or signed in his presence (s. 54). At any time before imprisonment has followed, the Court may recall the accused, and alter or modify the sentence, but cannot increase it (*ibid.*).[3] The signature to the sentence authenticates the findings on which it proceeds (*ibid.*). If an error is discovered in the minutes of procedure, or in the extract, it may be corrected at any time prior to execution on the conviction. and authenticated by the initials of the clerk (s. 55).[4] An extract in the form of Schedule E is a sufficient warrant for apprehension and commitment to prison, and is not void, or liable to be set aside, on account of any error or defect in point of form (s. 56). In a Court consisting of more than one judge, the signature of one judge is sufficient to all warrants or proceedings prior or subsequent to conviction, and such judge need not be one of those who try the case (s. 57). A conviction of a part, or parts, of the charges libelled, implies dismissal of the rest of the complaint (s. 58).

713. Great care must be taken in the minuting of a conviction on a complaint which libels alternative charges, as, should the conviction be recorded as a general one (*e.g.* "guilty as libelled"), thus leaving dubiety as to the specific charge or charges found proved, it will not stand. The cases dealing with this point are very numerous, but the following, as the most recent, may be mentioned, viz. *Lang* v. *Walker*,[5] *Connell* v. *Mitchell*,[6] *M'Cullochs* v. *Rae*,[7] and *Vaughan* v. *Smith*.[8] It

[1] See the opinion of Lord Justice-Clerk Macdonald in *Paterson* v. *MacLennan*, 1914, 7 Adam 428, at p. 431.

[2] *M'Lauchlan* v. *Davidson*, 1921, J.C. 45. [3] *Cf. M'Rory* v. *Findlay*, 1911, 6 Adam 417.

[4] *Cf. Smith* v. *Sempill*, 1910, 6 Adam 348; and as to erasures on the records, see *White and Ors.* v. *Jeans*, 1911, 6 Adam 489, per Lord Justice-Clerk Macdonald at p. 496.

[5] 1909, 6 Adam 180. [6] 1912, 7 Adam 23.

[7] 1915, 7 Adam 602. [8] 1919, J.C. 9.

has frequently been pointed out that the mere use of the disjunctive "or" as separating charges, or parts of charges, does not necessarily make them alternative charges. What the Court has to determine is whether they are true alternatives, and the test to apply is, "Could a man charged under the indictment (or complaint) be guilty of all the charges libelled?" [1] If they are not mutually exclusive they are not proper alternatives.

Subsection (6).—*Forfeiture of Implements.*

714. In all cases the Court has power to order the forfeiture and destruction, or disposal otherwise, of instruments or articles found in the possession of the accused, used or calculated to be of use in the commission of the offence charged (s. 44). This provision will authorise the forfeiture of poaching-nets, housebreakers' tools, weapons of assault, and similar articles. The general power of forfeiture thus conferred is in supplement of specific powers of a like kind conferred on Courts by certain Acts of Parliament which penalise particular offences, *e.g.* to forfeit betting material seized under the Street Betting Act, 1906,[2] and liquor kept for trafficking purposes in unlicensed premises and seized under warrant.[3] Goods seized under the Revenue Acts may be condemned.[4]

Subsection (7).—*Recovery of Penalties.*

715. In every case, whether the statute or order imposing a penalty does or does not provide any method for its recovery, the Court may adjudge the accused to be imprisoned in default of payment, either immediately or within such period as the Court may fix (s. 47). Such imprisonment must not exceed the statutory scale, viz., Fine or caution not exceeding 5s., imprisonment not to exceed five days; exceeding 5s. but not exceeding £1, ten days; exceeding £1 but not £3, twenty days; exceeding £3 but not £5, thirty days; exceeding £5 but not £20, sixty days; exceeding £20, three months (s. 48). In Revenue cases, where the sum adjudged exceeds £50, imprisonment may exceed three months but not six months (s. 4). Where the penalties attached to an offence are not defined, punishment is regulated by that applicable to common law offences in the Court in which the complaint is instituted (s. 27). If the period of imprisonment is not specified, it is held to be the maximum period under the above scale (s. 48). If the period inserted in the sentence is in excess of the scale, it is held to be reduced to the maximum under the scale, and the judge may order the sentence and extract to be corrected (*ibid.*).[5] The above scale applies in all statutory

[1] *M'Cullochs* v. *Rae*, 1915, 7 Adam 602, per Lord Justice-General Strathclyde at p. 607.
[2] 6 Edw. VII. c. 43, s. 1 (1) (*c*). [3] Licensing (Scotland) Act, 1903, s. 96.
[4] 1908 Act, s. 4.
[5] Where, in a case tried by several judges, the correction was intimated by two only of their number, it was held that, being merely an executorial Act, the alteration was competent (*Renwick* v. *M'Dougall*, 1913, 7 Adam 91).

contraventions, notwithstanding that the Act contravened fixes a different period of imprisonment (*ibid.*). Hard labour must not be added to imprisonment on a statutory charge without express statutory authority.[1] In those cases where a penalty falls to be recovered by civil diligence in terms of the 1908 Act (as where a corporate body is convicted),[2] or where the Court may think it expedient to order recovery in that fashion,[3] an order for arrestment and poinding and sale is added to the sentence (s. 49). The diligence is executed in the same manner as proceedings under the Small Debt Acts. If recovery by civil diligence is ordered, imprisonment is not thereafter competent (*ibid.*). It was pointed out in *Moffat* v. *Shaw*[4] that imprisonment is the more humane and effective alternative in the case of a poor man. It is not necessary to specify the person to whom a penalty is to be paid unless it is necessary to provide for the division of the penalty (*e.g.* under the Diseases of Animals Act, 1894[5]). In all other contingencies, penalties are to be paid to the clerk of Court, and accounted for by him to the person entitled thereto (s. 51).

716. Where the Court has adjudged an accused person to pay any sum (fine in the normal case), it may order him to be searched, and any money found on him then, or on his apprehension, or when he is taken to prison in default of payment of the sum adjudged to be paid, may, unless the Court otherwise directs, be applied towards payment thereof, any surplus being returnable.[6] But should the Court be satisfied that such money does not belong to him, or that the loss of it would be more injurious to his family than his imprisonment, it will not be so applied.[6] The procedure to be followed when the Court has come to this determination at the time of sentence, as well as that which regulates the disposal of money found on an accused person only when taken to prison after sentence, is laid down in Act of Adjournal relative to the Criminal Justice Administration Act, 1914, dated 18th March 1915.

Subsection (8).—*Caution.*

717. Caution may be found either by consignation in the hands of the clerk of Court, or by bond, which may be signed by mark. Forfeiture is granted by the Court on the motion of the prosecutor. The Court may either imprison the cautioner on failure to pay on a charge of six days, or order recovery by civil diligence. Bail is found and forfeited in the same way as caution. If the accused was liberated under a penalty in the event of his failing to appear, and the penalty is declared forfeited, sentence may be pronounced for this penalty, either separately or by adding it to any other penalty imposed, and

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[1] *Anderson* v. *Begg*, 1907, 5 Adam 387.

[2] 1908 Act, s. 28 (1).

[3] For a case where a Court exercised this discretion without challenge, see *Kinnear* v. *Brander*, 1914, 7 Adam 456, at p. 459.

[4] 1896, 2 Adam 57, per Lord M'Laren.

[5] 57 & 58 Vict. c. 57, s. 57.

[6] Criminal Justice Administration Act, 1914 (4 & 5 Geo. V. c. 58), s. 4.

warrant may be granted for his imprisonment in the event of non-payment (1908 Act, s. 50).

Subsection (9).—*Expenses.*

718. In a complaint for the prosecution of an offence at common law, no expenses are, as a rule, awarded to either party, although it is probable that the inherent power of the Court would justify such an award, if made.[1] In a complaint for a statutory offence, expenses may be awarded to or against a private prosecutor; but they cannot be awarded to or against a person prosecuting in the public interest, unless the statute or order, directly or by implication, authorises such award (s. 52).[2] Expenses may be directed to be met in whole or in part out of the penalty (*ibid.*). The finding regarding expenses must be stated in the sentence disposing of the case (*ibid.*). In the ordinary case of an award to the prosecutor there will be little difficulty in ascertainment of the amount in time for inclusion in the sentence. It may be different, however, in the case of a respondent's expenses, and here the appropriate procedure would be for the Court to adjourn final judgment so as to afford opportunity for ascertainment, whether as the result of a remit to the auditor for taxation or otherwise.[3] As regards expenses awarded to the prosecutor, these are restricted to the fees in Schedule G,[4] and are recovered in the same manner as the penalty; as regards expenses awarded to the accused, there is no statutory provision, but they are recoverable by civil diligence (*ibid.*). Expenses may be awarded without imposing a penalty (*ibid.*). Where the penalties do not exceed £12, the total expenses must not exceed £3; but where it appears to the Court that the reasonable expenses of the prosecutor's witnesses, with the other expenses, exceed the sum above mentioned, the expenses of the witnesses may be directed to be paid in whole or in part out of the penalty (*ibid.*). It seems clear that under powers conferred in a later section (s. 54), it would be open to the Court to correct an excessive award of expenses, if it were noticed before imprisonment had followed upon the sentence. The High Court has power to amend sentences on appeal (s. 75). This has been applied to the effect of awarding expenses against an accused person in a case in which the inferior Court had made no award.[5]

Subsection (10).—*Execution.*

719. As already stated, the 1908 Act is the warrant for execution of sentences pronounced under it,[6] and the necessary executive clauses are inserted in the extracts issued. The warrant in the sentence may

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[1] *Ledgerwood* v. *M'Kenna*, 1868, 7 M. 261.
[2] See *Ross* v. *Stirling*, 1869, 1 Coup. 336; *Todrick* v. *Wilson*, 1891, 3 White 28.
[3] *Lindsay* v. *J. & G. Cox, Ltd.*, 1907 S.C. 96.
[4] For a case which illustrates the inclusion of an illegal charge, see *Whillans* v. *Stevenson*, 1902, 4 Adam 64.
[5] *M'Cluskey* v. *Boyd*, 1916, 7 Adam 742.
[6] *Supra*, para. 712.

without indorsation be executed at any place within Scotland by any officer of law (s. 25). Out of Scotland execution is regulated by the statutes mentioned in s. 25.

Subsection (11).—*Youthful Offenders.*

720. Special provisions are contained in the Children Act, 1908, affording means, both reformative and punitive, of dealing with persons under the age of sixteen who are charged with offences. Imprisonment of a child under fourteen was made illegal by that Act,[1] and, save in cases of special unruliness or depravity of character, there is the same bar to imprisonment of youthful offenders between fourteen and sixteen.[2] In substitution, custody in a place of detention may be ordered.[3] Methods of treatment other than probation (already described),[4] which do not involve the recording of a conviction against the child, include committal to a certified industrial school,[5] committal to the care of a relative or other fit person,[6] and the pronouncement of an order on a parent or guardian to give security for the child's good behaviour.[7] Methods of disposal which involve conviction of the youthful offender include committal to a certified reformatory school,[8] whipping (a penalty both common law [9] and statutory [10]), committal to custody in a place of detention,[11] the imposition of a fine, and the pronouncement of an order on a parent or guardian to pay a fine imposed on the child.[12] Reference should be made to s. 107 of the Act, which brings within the compass of a single clause the various methods available to Courts for dealing with offenders of the ages stated.

Subsection (12).—*Mental Defectives.*

721. The Mental Deficiency and Lunacy (Scotland) Act, 1913,[13] provides the procedure to be followed in the case of mental defectives who come before the Courts. The Court, when satisfied, (1) in the case of persons who are charged as offenders, that the charge is proved, and (2) in the case of children who fall to be dealt with under s. 58 of the Children Act, that they are liable to be sent to an industrial school, if it further appears that they are defectives within the meaning of the Act,[14] is empowered, without proceeding to convict or to commit to a school, as the case may be, to adjourn the proceedings and report the case to the local authority concerned, or to the Procurator-Fiscal of the Sheriff Court, with a view to the presentation of a petition to the Sheriff for a judicial order whereunder they may be either sent to an appropriate institution, or put under the care of a suitable guardian.

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[1] Sec. 102 (1). [2] *Ibid.*, subs. (3). [3] *Ibid.*, s. 106.
[4] *Supra*, paras. 707, 708. [5] Children Act, s. 58 (3).
[6] *Ibid.*, ss. 58 (7) and 59. [7] *Ibid.*, s. 99 (3). [8] *Ibid.*, s. 57.
[9] For its applicability, see *Mackay* v. *Lamb*, 1923, J.C. 16.
[10] Burgh Police (Scotland) Act, 1892, s. 514. [11] Children Act, s. 106.
[12] *Ibid.*, s. 99 (1). [13] 3 & 4 Geo. V. c. 38, s. 9. [14] For definitions see s. 1.

The duty is laid upon the prosecutor of the reporting Court and the initiator of proceedings under s. 58 of the Children Act to furnish to that Court such evidence of mental defect as may be available.[1] The judicial order to be pronounced by the Sheriff must have the consent of the parent or guardian where he can be found, but the Sheriff may dispense with such consent if unreasonably withheld. The Act regulates the duration of detention under a judicial order, and provides for interim detention or guardianship pending the proceedings contemplated.

PART VI.—PUNISHMENT.

Section 1.—Introduction.

722. Punishment is the penalty imposed upon a person convicted in due course of law upon indictment or upon summary complaint. It may take the form of deprivation of life, of deprivation of liberty for a fixed period, or of the exaction of a pecuniary penalty.

Section 2.—Punishments in General Use.

Subsection (1).—*General.*

723. Punishments fall into two categories. One embraces those which are determined by the nature of the crime, and in respect of which the judge is bound to pronounce a fixed sentence. For example in a case of murder or of high treason he must pronounce sentence of death. The other embraces those which are arbitrary, by which is meant that the judge in pronouncing sentence has full discretion in the matter of the punishment to be imposed so far as his jurisdiction in that matter extends. His powers may be wide enough to include, at one end of the scale, penal servitude for life, and at the other, imprisonment for a short period or a pecuniary penalty. In the exercise of this discretion the judge is guided by a consideration of such circumstances as the gravity of the offence and the age and previous record of the accused.

724. Offences created by statute, or by regulations having statutory force, are, as a rule, punishable in the manner prescribed by the statute, and apart from express power conferred by the legislature the prescribed punishment would require to be imposed in every case. As a rule, the maximum penalty is stated in the Act, and the judge has discretionary power to impose such punishment, not exceeding that maximum, as the circumstances appear to him to require.

Subsection (2).—*Jurisdiction of Courts quoad Punishment.*

725. The type and severity of punishment to be imposed are determined also by the limits of the jurisdiction conferred upon the

[1] 3 & 4 Geo. V. c. 38, s. 9 (3).

Court in which the offence is tried. The High Court of Justiciary has inherent power to punish "every act which is obviously of a criminal nature." [1] It is the only Court which has power to pronounce sentence of death or of penal servitude.

The Sheriff Court has a dual jurisdiction with corresponding powers of punishment. In the case of a person convicted on indictment the maximum punishment is two years' imprisonment, with or without hard labour.[2] In the case of a person convicted on summary complaint the maximum punishment may be (*a*) a fine not exceeding £25, (*b*) imprisonment, with or without hard labour, not exceeding three months.[3] In addition the Sheriff has certain powers to ordain the convicted person to find caution. Failure to find caution or to pay any fine imposed may be met by a sentence of imprisonment.[4] In certain cases the Sheriff has power to pronounce a sentence of imprisonment for six months.[5]

The other inferior Courts, viz. justices of the peace, judges of police, and burgh magistrates have restricted powers of imposing fines and imprisonment.[6]

Section 2.—Forms of Punishment.

Subsection (1).—*The Capital Sentence.*

726. A capital sentence is competent only upon conviction of murder, or of offences against the Act 10 Geo. IV. c. 38, or of treason.[7]

Subsection (2).—*Penal Servitude.*

727. Penal servitude was first introduced in the year 1853. The statute effecting this [8] was entitled "An Act to substitute, in certain cases, other punishment in lieu of transportation." As its title indicates, this Act did not abolish transportation, but restricted its use. In 1857 an amending Act was passed, which abolished transportation entirely and provided that, after its commencement, any person who might previously have been sentenced to a period of transportation should be liable to be sentenced to be kept in penal servitude for a similar period.[9]

728. Penal servitude may be imposed for any "period not less than three years, and not exceeding either five years, or any greater period authorised" by the penal servitude Acts.[10] But where a Court is empowered to award a sentence of penal servitude, it may, in its discretion, award imprisonment for any term not exceeding two years, with or without hard labour.[11] The phraseology of the statute rather

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[1] Hume, i. 12.
[2] Cp. 54 & 55 Vict. c. 69, s. 1 (2).
[3] 8 Edw. VII. c. 65, s. 11.
[4] *Ibid.*, ss. 11 and 48.
[5] *Ibid.*, s. 12.
[6] *Ibid.*, s. 7.
[7] 50 & 51 Vict. c. 35, ss. 56 and 75.
[8] 16 & 17 Vict. c. 99.
[9] 20 & 21 Vict. c. 3, s. 2.
[10] 54 & 55 Vict. c. 69, s. 1 (i).
[11] *Ibid.*, s. 1 (ii).

obscures the fact that penal servitude is, next to the death sentence, the severest punishment known to our law, and that its duration may be for life. No child or young person under sixteen may be sentenced to penal servitude for any offence.[1]

Subsection (3).—*Imprisonment.*

729. In the case of offences not sufficiently grave to be punished by penal servitude, the offender may be sentenced to a period of imprisonment, with or without hard labour.[2] The sentence imposed may include a fine in addition to the period of imprisonment. In the normal case the period of imprisonment may not exceed two years.[3]

Subsection (4).—*Whipping.*

730. It was formerly the custom, under the common law, to sentence persons of all ages who had been convicted of crime to be whipped or scourged.[4] But in more modern times this form of punishment fell gradually into disuse; and by an Act passed in the year 1862 the power to condemn offenders to be whipped was almost entirely abrogated, except in the case of children. This Act provides that in Scotland no offender above sixteen years of age shall be whipped for theft or for crime committed against person or property.[5] As regards children ("offenders whose age does not exceed fourteen years"), it prescribes that the number of strokes inflicted shall not exceed twelve, and the instrument used shall be a birch rod.[6]

731. Whipping, however, may still be inflicted in certain cases under statute:

(i) Any person convicted of discharging firearms at, or throwing or using any offensive matter or weapon with intent to injure or alarm, the King may be sentenced to penal servitude or imprisonment, and during the imprisonment to be publicly or privately whipped, as often as and in the manner and form which the Court shall direct, not exceeding thrice.[7]

(ii) In every case where it is competent for any judge or magistrate to award sentence of imprisonment, or of fine with the alternative of imprisonment, it shall be lawful for such judge or magistrate, in the case of any juvenile offender, being a male, whose age in the opinion of such judge or magistrate shall not exceed fourteen years, to adjudge such offender, instead of imprisonment or of imprisonment and hard labour, to be punished by private whipping, in such manner and according to such regulations as have been or shall be made by the Lord Advocate of Scotland in that behalf, and approved by one of His Majesty's Principal Secretaries of State.[8]

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[1] 8 Edw. VII. c. 67, s. 102.
[2] Cp. 8 Edw. VII. c. 65, ss. 7, 11, 12, 43.
[3] 54 & 55 Vict. 69, s. 1 (ii).
[4] See Hume, ii. 149–152 and 488.
[5] 25 Vict. c. 18, s. 2.
[6] *Ibid.*, s. 1.
[7] 5 & 6 Vict. c. 51, s. 2.
[8] 23 & 24 Vict. c. 105, s. 74.

(iii) The Criminal Law Amendment Act, 1885, provides that, if the age of a person convicted of defilement of a girl under thirteen years does not exceed sixteen years, the Court may, instead of sentencing him to any term of imprisonment, order him to be whipped as prescribed by the Act 25 Vict. c. 18, and the said Act shall apply, so far as circumstances admit, as if the offender had been convicted in manner in that Act mentioned; and if, having regard to his age and all the circumstances of the case, it should appear expedient, the Court may, in addition to the sentence of whipping, order him to be sent to a certified reformatory school, and to be there detained for a period of not less than two years and not more than five years.[1]

Subsection (5).—*Fines.*

732. At common law a fine may be imposed in the case of less serious offences,[2] and it may be conjoined with a period of imprisonment. Under the Summary Jurisdiction (Scotland) Act, 1908, it is included among the sentences which may be imposed by Courts of summary criminal jurisdiction.[3] It is also the usual statutory penalty for the breach of statutory regulations.

Section 3.—Special Statutory Punishments.

Subsection (1).—*Habitual Criminals.*

733. The expression is defined in the Prevention of Crime Act, 1908, which provides that a person shall not be found to be an habitual criminal unless the jury finds on evidence (*a*) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the indictment been convicted of a crime, whether any such previous conviction was before or after the passing of the Act, and that he is leading persistently a dishonest or criminal life, or (*b*) that he has on such a previous conviction been found to be an habitual criminal and sentenced to preventive detention.[4]

Where a convicted person either admits that he is an habitual criminal, or is so found by the jury, and the Court passes a sentence of penal servitude, it may, if of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, pass a further sentence ordering that, on the determination of the sentence of penal servitude, he be detained for such period, not exceeding ten nor less than five years, as the Court may determine, such detention to be referred to as preventive detention.[5]

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[1] 48 & 49 Vict. c. 69, s. 4.
[2] Hume, ii. 492.
[3] 8 Edw. VII. c. 65, ss. 7, 11, 43, and 48.
[4] 8 Edw. VII. c. 59, s. 10 (2).
[5] *Ibid.*, s. 10 (1).

SUBSECTION (2).—*Habitual Drunkards.*

734. This class of offenders is dealt with by the Inebriates Act, 1898.[1] This is an English Act both in intention and in phraseology, but by special sections its provisions are applied to Scotland. Sec. 23 enacts that where in Scotland a person is convicted on indictment of an offence punishable with imprisonment or penal servitude, if the Court is satisfied from the evidence that the offence was committed under the influence of drink, or that drunkenness was a contributing cause of the offence, and the offender admits that he is or is found by the jury to be an habitual drunkard, the Court may, in addition to or in substitution for any other sentence, order that he be detained for a term not exceeding three years in any State inebriate reformatory or in any certified inebriate reformatory, the managers of which are willing to receive him.

735. Any person who in Scotland commits any of the offences mentioned in the first schedule to the Act, and who within the twelve months preceding the date of the commission of the offence has been convicted summarily at least three times of any offences so mentioned, and who is a habitual drunkard, may be tried on indictment before the High Court of Justiciary or the Sheriff with a jury, or with his own consent by the Sheriff summarily, and shall be liable on conviction to be detained for a term not exceeding three years in any certified inebriate reformatory, the managers of which are willing to receive him.[2]

SUBSECTION (3).—*Youthful Offenders.*

736. Careful and elaborate provision for the treatment of youthful offenders is made in three Acts—the Probation of Offenders Act, 1907, the Prevention of Crime Act, 1908, and the Children Act, 1908.

The Probation of Offenders Act permits the conditional release of an offender where the Court is of opinion that in view of his age this is expedient.[3]

The Prevention of Crime Act, Part I., is concerned with the "reformation of young offenders," *i.e.* persons not less than sixteen nor more than twenty-one years of age. Its purpose is to absolve the Court from the necessity of sentencing young offenders to penal servitude or imprisonment, by giving power to order their detention in a Borstal Institution under penal discipline for a term of not less than one year nor more than three years.[4]

737. The Children Act deals in Part V. with juvenile offenders. The effect of its provisions is to exempt children so far as possible from the punishments to which adults are liable and to substitute treatment of a special sort in their place. For the purposes of the Act a "child" is defined as "a person under the age of fourteen years": and "a

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[1] 61 & 62 Vict. c. 60.
[2] *Ibid.*, s. 24.
[3] 7 Edw. VII. c. 17, s. 1.
[4] 8 Edw. VII. c. 59, s. 1.

young person" as a "person who is fourteen years of age or upwards and under the age of sixteen years." [1]

A child may not be sentenced to imprisonment or penal servitude for any offence, or committed to prison in default of payment of a fine, damages, or costs. A young person may not be sentenced to penal servitude for any offence. A young person may not be sentenced to imprisonment for an offence or committed to prison in default of payment of a fine, damages, or costs, unless the Court certifies that the young person is of so unruly a character that he cannot be detained in a place of detention, or that he is of so depraved a character that he is not a fit person to be so detained.[2] No child or young person may be sentenced to death. In lieu of that sentence the Court is required to order the child or young person to be detained during His Majesty's pleasure.[3]

The Act, however, directs that, in the case of certain crimes committed by children and young persons, the Court may sentence the offender to be detained for such period as may be specified in the sentence, and in such place and on such conditions as the Secretary of State may direct.[4] An omnibus section gives the Court a wide scope for dealing with the offender where it is satisfied of his guilt.[5] There is also an important provision in Part IV. which enables the Court, when it is of opinion that the youthful offender is twelve years of age or upwards, but less than sixteen, to order him, upon conviction, to be sent to a certified reformatory school.[6] See Children and Young Persons.

Section 4.—Historical and Miscellaneous.

Subsection (1).—*Attainder.*

738. Attainder is or, more probably, was one of the consequences of a conviction for high treason. It is a technical term of the law of England, imported into the Scottish system by the Act 7 Anne, c. 21, which was passed with the express object of assimilating the law of Scotland to that of England in this matter. That Act provided that all persons convicted or attainted of high treason or misprision of high treason in Scotland should be subject and liable to the same corruption of blood, pains, penalties, and forfeitures as persons convicted or attainted of high treason or misprision of high treason in England.[7] "By this taint," as Blackstone expresses it, "the channel which conveyed the hereditary blood from his (*i.e.* the traitor's) ancestors to him is not only exhausted for the present, but is totally dammed up and rendered impervious for the future." [8] If one may translate into more modern but much less picturesque language, attainder involved forfeiture to the Crown of all property belonging to the traitor and the consequent deprivation of his heirs.[9] Bell states that "corruption

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[1] 8 Edw. VII. c. 67, s. 131. [2] *Ibid.*, s. 102. [3] *Ibid.*, s. 103.
[4] *Ibid.*, s. 104. [5] *Ibid.*, s. 107. [6] *Ibid.*, s. 57.
[7] Act 7 Anne, c. 21, s. 3. [8] Hume, i. 550.
[9] *Earl of Perth* v. *Lady Willoughby de Eresby's Trs.*, 1871, 9 M. (H.L.) 83.

of blood bars succession"; [1] and again that "in particular crimes (as treason) there is no succession; the criminal's estate being forfeited from the traitor and his heirs, and his blood being corrupted." [2]

739. The Forfeiture Act, 1870, abolished attainder in England, at the same time removing the more barbarous and inhuman incidents, such as drawing and quartering, from the punishment for treason [3] (the barbarities of the sentence had already been softened by the Treason Act of 1814 [4]); but it is declared in terms that its provisions do not extend to Scotland.[5] The strange result is that this element of the law of treason, grafted on our system from the law of England, has been repealed in the country of its origin, but still, in theory at least, applies in Scotland, though the last attainders here date back to the rebellion of 1745.

Subsection (2).—*Fugitation.*

740. Fugitation, or outlawry, is the sentence pronounced by the High Court of Justiciary against an accused person who has been duly cited to appear before that Court, but fails, without just excuse, to obey the citation.[6] Its effect is that the accused forfeits his person in law.[7] This means that he is disabled from holding any place of trust, from giving evidence, from pursuing or defending an action, and, generally, from claiming any personal privilege or benefit whatsoever of the law.[8] If he is on bail, his bail-bond is forfeited. "This sentence is a warrant also for denouncing him a rebel, or putting him to the horn, as it is called, whereby his moveable substance escheats to His Majesty; and if he remain a year in this condition, the profits also of his heritable estate are forfeited to his superiors for his lifetime." [8]

741. A sentence of fugitation may be recalled (*a*) *de jure*, or (*b*) on petition to the Court.

(*a*) It is recalled *de jure* when the public prosecutor arraigns the panel at the bar upon the same charge in a new libel.[9]

(*b*) But it is also open to the outlaw to present a petition praying the Court to repone him against the sentence of fugitation, in order that he may stand his trial.[10] And there is a case in the books where the Court granted a petition for recall brought by the outlaw's widow, and declared the moveable goods and gear of the deceased freed from the escheat of the Crown.[11]

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[1] Bell's Prin., s. 1645.
[2] *Ibid.*, s. 1639.
[3] 33 & 34 Vict. c. 23, ss. 1 and 31.
[4] 54 Geo. III. c. 146.
[5] 33 & 34 Vict. c. 23, s. 33.
[6] *H.M. Adv.* v. *Monson and Sweeney*, 1893, 1 Adam 114.
[7] Alison, ii. 350.
[8] Hume, ii. 270, 271.
[9] *H.M. Adv.* v. *Clyne*, 1875, 3 Couper 149; following *H.M. Adv.* v. *Archibald and Susan Miller*, 1850, J. Shaw 288.
[10] *Michael Hinchy* v. *H.M. Adv.*, 1864, 4 Irvine 559; *Sweeney, Petr.*, 1894, 1 Adam 392.
[11] *Marion Lindsay, Webster, and Ors., Petrs.*, 1858, 3 Irvine 285.

Subsection (3).—*Banishment.*

742. Under the old Scots Law sentence of banishment might be pronounced against an accused person for a variety of offences. These included leasing-making (*i.e.* defamation of the king),[1] subornation of perjury,[2] and writing anonymous threatening letters.[3] Only the Court of Justiciary could banish from Scotland,[4] but inferior Courts, sitting without a jury, could banish from a burgh or county.[5] Usually the convict was left to carry out the sentence himself, enough time being allowed him to get out of the country. But the sentence was under certification of further penalties (such as death, transportation, imprisonment, or whipping) if he returned to Scotland before the expiration of his sentence. Later, this mode of punishment gave place to transportation beyond seas; and, finally, by Sir William Rae's Act,[6] it was declared incompetent for any judge or magistrate to pronounce sentence of banishment forth of Scotland, or forth of any burgh or district or county of Scotland, except in those cases where, by statute, the punishment of banishment forth of Scotland is enacted and specially provided for any specific offence. The only cases of importance answering to this description are dealt with by the Act 1661, c. 34, as amended by 4 & 5 Will. IV. c. 28. Under these statutes the penalty of banishment from Scotland may be imposed on a layman who celebrates a marriage, or on any person, whether a minister of religion or not, who performs the marriage ceremony without banns having been proclaimed or a certificate of banns presented to him.

Subsection (4).—*Forfeiture.*

743. Forfeiture is the loss or deprivation of property or rights consequent on conviction for some offence.

(i) It is one of the consequences in Scotland (though no longer in England) of conviction on a charge of high treason.[7]

(ii) It is also one of the penalties involved in a decree of fugitation: for that decree is a warrant for denouncing the fugitive a rebel, whereupon his moveable property falls under the single escheat to the Crown.[8]

(iii) Under the Scots Law (apart from the law of treason, which was assimilated to that of England by the Act 7 Anne, c. 21, passed in the year 1708 and entitled "An Act for improving the Union of the two Kingdoms") forfeiture takes two forms, named single escheat and liferent escheat. The former effects the confiscation of all moveables belonging to the rebel or the convicted person, and also all that may be

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[1] See Hume, i. 351: where it is defined as a "verbal injury directed against the King."

[2] *Ibid.*, i. 384.

[3] *Ibid.*, i. 441.

[4] *Ibid.*, ii. 58.

[5] *Ibid.*, ii. 147.

[6] 11 Geo. IV. & 1 Will. IV. c. 37, s. 10.

[7] See "Attainder," para. 738, *supra.*

[8] See "Fugitation," para. 740, *supra*; and Ersk. Inst. ii. 5, 57, and 58.

acquired by him before relaxation. But it does not include bonds bearing interest, because these are heritable *quoad* the fisc, though moveable as between heir and executor; on the other hand, leases are included, although they are heritable as regards succession, except in the case of liferent leases, not acquired by assignation, which fall under liferent escheat.

The single escheat may "fall," says Erskine, "without any denunciation by a messenger. Thus it falls, by our customary law, upon sentence of death, pronounced in a criminal trial; and by special statute upon one's being convicted of certain crimes, though not capital, *e.g.* perjury and bigamy,[1] deforcement and breach of arrestment,[2] and usury.[3] And he adds a note to the effect that "the usury laws were repealed by 17 & 18 Vict. c. 90. It is not usual to escheat a convict's goods, except when sentence of death is pronounced." [3]

744. Liferent escheat affects the rents or other profits accruing from the rebel's heritable estate, where the state of rebellion has continued for a year and a day after denunciation; these now go to the rebel's immediate superior or superiors "during all the days of his life, while he continues unrelaxed, whether those subjects belong to the rebel in property or barely in liferent." [4] But the fee remains in the rebel.[5]

Subsection (5).—*Forfeiture of Implements.*

745. When a statute prohibited the doing of any act for which particular implements are required or used, it was customary to include the forfeiture of the implements in the penalties enacted. Examples of this are supplied by the Poaching Prevention Act, 1862;[6] the Salmon Fisheries (Scotland) Act, 1868;[7] the Weights and Measures Act, 1878,[8] ss. 25 and 26; the Herring Fishery (Scotland) Act, 1889;[9] and many others. It is now laid down by the Summary Jurisdiction (Scotland) Act, 1908,[10] that where an accused person is "convicted of any offence or dealt with under the Probation of Offenders Act, 1907, the Court shall have power to order the forfeiture of any instruments or other articles found in his possession used or calculated to be of use in the commission of the offence, and also to order said instruments or other articles to be destroyed or otherwise disposed of."

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[1] 1551, c. 19. [2] 1581, c. 118.
[3] Ersk. Inst. ii. 5, 57; 1597, c. 251.
[4] Ersk. ii. 5, 66.
[5] *Macrae* v. *Macrae*, 1839, Macl. & R. 645.
[6] 25 & 26 Vict. c. 114, s. 2.
[7] 31 & 32 Vict. c. 123, s. 31.
[8] 41 & 42 Vict. c. 49, ss. 25 and 26.
[9] 52 & 53 Vict. c. 23, s. 4.
[10] 8 Edw. VII. c. 65, s. 44.

CRITICISM.

See DEFAMATION.

CROFTERS.

See SMALL LANDHOLDERS ACTS.

CROP.
CROPPING.

See AGRICULTURAL HOLDINGS ACTS; HYPOTHEC; LEASE.

CROSS EXAMINATION.

See WITNESS.

CROWN, THE.

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Section 1.—Definition.

746. It is important not to use the expression "the Crown" without definition.[1] "The Crown" has been defined by statute as "the Sovereign for the time being."[2] This definition accords with its use in s. 1 of the Crown Suits (Scotland) Act, 1857,[3] "An Act to regulate the

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General Authorities.—Sir W. R. Anson, Law and Custom of the Constitution, vol. ii. pt. i., 3rd ed. (1907); A. V. Dicey, Law of the Constitution (9th ed., 1922); F. W. Maitland, Constitutional History of England (1919); Medley, English Constitutional History, 6th ed. (1925); Chitty, Prerogatives of the Crown; Robertson, Civil Proceedings against the Crown; Robinson, Public Authorities and Legal Liability (1925) (especially Prof. J. H. Morgan's Introduction and Chap. I.); Juridical Review, v. 369; xxxv. 49; Report of Crown Proceedings Committee, April 1927 (C.M.D. 2842).

[1] F. W. Maitland, Constitutional History of England (1919 ed.), p. 418; *vide* also Dicey, Law of the Constitution, p. 11.

[2] Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 30.

[3] 20 & 21 Vict. c. 44.

institution of Suits at the instance of the Crown and the Public Departments in the Courts of Scotland," in which "the Crown" is coupled with, but distinguished from, the public departments of government. For the purposes of this article, however, the expression "the Crown" will not be restricted in its meaning to the sovereign but will be treated in the generally accepted and wider meaning,[1] namely, the sovereign and his patrimonial rights, on the one hand, and the public departments of government, in the execution of the powers of the Crown devolving upon them, on the other.[2] This article is concerned with the legal position of the Crown, more especially in its relations with the subject. The Crown as part of the machinery of the constitution is dealt with under titles of The Cabinet and Constitutional Law.

Section 2.—The Title to the Crown.

Subsection (1).—*Historical.*

747. The earliest form of monarchy in England was elective. The Saxon king was elected by the Witan, and while in practice the choice of the Witan came to be restricted to members of the royal family,[3] the elective character of the monarchy was reasserted by occasional use of the power of deposition. The first Norman kings held the Crown by the title of election, and the early Scottish kings appear also to have been elected.[4] The character of the title to the Scottish Crown was influenced by the Celtic law of tanistry, a form of election according to which on the death of a king the chief lords assembled and nominated a successor, not necessarily one of his children, but the nearest in blood who was eldest and worthiest.[5] The introduction of feudalism tended to obliterate the elective character of the kingship and to assimilate succession to the throne to the succession to a feudal superiority. This tendency was reflected in the altered appellation of the monarch—"King of England" instead of "King of the English." The elective character of the monarchy was, however, never lost sight of. Thus Henry VIII. obtained from Parliament the power to alter the succession by will, and James VI. of Scotland, on succeeding to the English throne, while claiming to reign of hereditary right, fortified his title by an Act of Recognition from Parliament.[6] In Scotland, the more complete adoption of feudalism favoured the growth of a title to the Crown based on hereditary right. But the Estates never relinquished the right to depose the king, and they exercised this right in 1689 against James VII. in a formal Declaration to the effect that the Estates had

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[1] F. W. Maitland, p. 422.

[2] Juridical Review, v. 369 ; *Perry* v. *Eames*, [1891] 1 Ch., at p. 668.

[3] Anson, Law and Custom of the Constitution, vol. ii. pt. i. c. iv.

[4] Major, Greater Britain (1521), Scot. Hist. Soc., p. 213.

[5] The claim of Bruce the elder to the Scottish Crown in 1291 was founded on the law of tanistry ; he belonged to the younger line, but was one degree less remote from the common ancestor than Balliol. *Vide* Scot. Hist. Rev., xxv. 97 (October 1927).

[6] 2 Jac. I. c. 1.

the constitutional power to dethrone a ruler who had violated the laws of the kingdom, that James had "forefaulted" the Crown, and that the throne was vacant.[1]

Subsection (2).—*Present Title.*

748. The present title to the Crown was fixed by the Act of Settlement, 1701,[2] and has been characterised as a "Parliamentary entail." [3] The title is a combination of the elective and hereditary conceptions. The succession was settled on the heirs of Sophia, widow of the Elector of Hanover, granddaughter of James I. But the settlement was and is subject to the following conditions, viz.: (1) every person who is or shall be reconciled to the Church of Rome, or shall hold communion with the Church of Rome, or shall profess the popish religion, or shall marry a Papist, is excluded from the Crown, and the people are absolved from their allegiance. The Crown goes to the next in succession being Protestant, as if the person who incurred the disability were dead; [4] (2) every king or queen succeeding to the throne by virtue of the Act of Settlement shall profess the Protestant religion at the first day of the meeting of the first Parliament, or at the coronation; [5] (3) every king or queen shall have the coronation oath administered at his or her coronation, according to the provisions of 1 Will. and Mary, c. 6; [6] (4) every person who shall come into possession of the Crown shall join in communion with the Church of England.[7] Other restraints and disabilities upon the holder of the Crown have been repealed. By the Act of Union with Scotland in 1707,[8] it was provided that the succession to the Crown of Great Britain should be the same as that provided for the succession to the Crown of England by the Act of Settlement.[9]

Section 3.—The Sovereign.

Subsection (1).—*Accession and Coronation.*

749. The modern forms used on the accession of a new sovereign to the throne consist first of a proclamation by the Lords Spiritual and Temporal and others, including the Lord Mayor of London, proclaiming that the heir to the Crown has become the sovereign of these realms. The new sovereign addresses the Council, and subscribes an oath for the security of the Church of Scotland.[10] The Privy Council are then sworn. The declaration against transubstantiation is also taken.[9] At coronation the sovereign is presented to the people by the

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[1] Hume Brown, History of Scotland, ii. 442; *cf.* the refusal in the English Declaration to affirm a deposition; Political History of England, viii. 304–5 (Sir R. Lodge).
[2] 12 & 13 Will. III. c. 2, s. 2.
[3] Anson, Law and Custom of the Constitution, vol. ii. pt. i. c. iv.
[4] 1 Will. and Mary, sess. 2, c. 2, s. 9.
[5] *Ibid.*, s. 10; 10 Edw. VII. & 1 Geo. V. c. 29, s. 1.
[6] 12 & 13 Will. III. c. 2, s. 2.
[7] *Ibid.*, s. 3.
[8] 6 Anne, c. 2, art. ii.
[9] 12 & 13 Will. III. c. 2.
[10] 6 Anne, c. 2, s. 4.

Archbishop of Canterbury as the undoubted sovereign of the realm, and they are asked if they are willing to do homage. After certain ceremonial, the coronation oath is administered. The anointing follows, and then the homage of the peers. The bond between the sovereign and the people is finally ratified by their natural allegiance to their sovereign. The form of the oath of allegiance is now settled by statute.[1] All who hold public office take the oath or make an affirmation,[2] but allegiance is due from all the people of the realm.[3]

Subsection (2).—*Demise.*

750. As legal theory attributes to the Crown perpetuity, there can, according to our law, be no *interregnum*, and the effect of the death of the sovereign is at once to transfer the office to the legal successor. It is in consonance with this theory that the death of the sovereign is spoken of as the demise of the Crown. The demise of the Crown formerly brought about the dissolution of Parliament, but the law in this respect has been altered by various statutes, the earliest of which is 6 Anne c. 7. The present state of the law on this subject is as follows: If there be a Parliament in existence at the demise of the Crown, it is not determined or dissolved by such demise, but continues to its natural term, unless sooner prorogued or dissolved.[4] The only effect of the demise on such a Parliament is that, if sitting, it must immediately proceed to act; if prorogued or adjourned, it must immediately meet and sit.[5] If the demise happen after the dissolution or expiration of a Parliament, and before the day appointed by the writ of summons for the assembling of a new Parliament, the last preceding Parliament must immediately convene and sit at Westminster, and be a Parliament for six months. If another demise occur within this period of six months, before the dissolution of this revived Parliament or before a new Parliament has assembled, the life of the old Parliament is again prolonged for six months from the date of such demise. If the demise happen on the day appointed by the writ for assembling, or after that day and before it has met and sat, the new Parliament must immediately convene and sit, and be a Parliament for six months, as in the preceding cases.[6] The Demise of the Crown Act, 1901, enacts that the holding of any office under the Crown, whether within or without His Majesty's dominions, shall not be affected, nor shall any fresh appointment thereto be rendered necessary, by the demise of the Crown. The enactment takes effect from the last demise of the Crown.[7]

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[1] 31 & 32 Vict. c. 72.
[2] 51 & 52 Vict. c. 46.
[3] Anson, Law and Custom of the Constitution, vol. ii. pt. i. c. 4, s. 2.
[4] 30 & 31 Vict. c. 102, s. 51.
[5] 6 Anne, c. 7.
[6] 37 Geo. III. c. 127.
[7] 1 Edw. VII. c. 5. Before this Act it was necessary for a new sovereign on accession to issue a proclamation continuing in office all office-holders under the Crown.

SUBSECTION (3).—*Style and Family Name.*

751. The style adopted by the sovereign since 1927 [1] is: "George the Fifth, by the Grace of God, of the United Kingdom of Great Britain, Ireland, and of the British Dominions beyond the seas, King, Defender of the Faith, Emperor of India." The Royal House and Family is now styled "The House and Family of Windsor," and all descendants in the male line of Queen Victoria, who are British subjects, other than females, marrying or married, bear the name of Windsor.[2]

SUBSECTION (4).—*The Sovereign's Family.*

752. The consort of a sovereign is a subject, though with certain privileges. Thus a consort is, during the subsistence of the marriage, protected by the law of treason, both as to life and (in the case of a queen-consort) as to chastity. This protection does not extend to a queen-dowager. The sovereign's consort may sue and be sued as a private subject. The children of the sovereign are subjects, and only the eldest son (and his wife) and his eldest daughter have special privileges. The latter are protected by the law of treason. The sovereign's eldest son succeeds at birth, in Scotland, to the Principality of Scotland.[3] He is a peer of Scotland, and is entitled to vote at the election of Scottish Representative Peers. The tenure of the principality confers on him the titles of Prince of Scotland, Duke of Rothesay, Earl of Carrick, Baron of Renfrew, and Lord of the Isles. The children of the sovereign may sue and be sued as private subjects.

SECTION 4.—THE PREROGATIVE.

SUBSECTION (1).—*Definition.*

753. Of the powers exercised by the Crown, some are conferred upon it by statute, while others exist by virtue of custom. The statutory powers have for the most part been granted since the growth of administration made it necessary to allocate the powers of the sovereign to the ministers of State whose departments are responsible for their exercise. On the other hand, the customary powers of the Crown are usually inherent in the Crown, rather than in any one department. The term "prerogative" is frequently applied to all the powers, customary or statutory, residing in the Crown. "Prerogative" should properly be limited to the customary powers of the Crown. Professor Dicey defines it as "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown": [4] it includes

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[1] Royal Proclamation, 13th May 1927 (London *Gazette*, 13th May 1927) in pursuance of the Royal and Parliamentary Titles Act, 1927 (17 Geo. V. c. 4), s. 1.

[2] Royal Proclamation, 17th July 1917 (S. R. & O., 1917 (No. 731), p. 147).

[3] See para. 764, *infra*.

[4] Dicey, Law of the Constitution, p. 420.

everything which the king or his servants can do without the authority of an Act of Parliament.[1]

Subsection (2).—*Sources.*

754. The sources of the prerogative have been classified as threefold,[1] (*a*) the executive power of the early kings, (*b*) feudalism, (*c*) legal theory. Derived from the first source are the most important prerogatives of the Crown,[2] *e.g.* the conduct of war,[3] the making of treaties, the creation of courts of justice,[4] and appointment of judges.[5] From feudalism there are derived those branches of the prerogative which are inherent in the king as the ultimate feudal superior. These rights, in Scotland, include his paramount superiority of all lands held on feudal tenure,[6] and his *regalia*, or rights reserved over the estates or persons of subjects.[7] Legal theory has also clothed the Crown with certain fictitious attributes, amongst which the principal, according to English law, are its pre-eminence, perpetuity ("the king never dies"),[8] and perfection ("the king can do no wrong").[9] While in regard to constitutional law there is no room for difference between England and Scotland, in private law the fictitious attributes of the Crown in England and Scotland are not necessarily the same.[10]

Section 5.—The Royal Revenue.

755. The national revenue,[11] consisting of the rents or duties from lands, regalia, and feudal dues was originally at the king's absolute disposal. No distinction was at first observed between the king in his private and in his public capacity. The conception that the revenue of the Crown should be specifically appropriated to public purposes was slow in developing. Still, attempts were made to prevent lavish alienation of Crown lands, by such enactments [12] as that lands annexed to the Crown should in future be inalienable without the approval of the Estates. Further, Parliament both in England and Scotland acquired the appropriation of revenue obtained by new sources of taxation. But the hereditary revenues of the Crown were at first beyond the control of the Parliaments. With these revenues the king was expected

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[1] Anson, Law and Custom of the Constitution (quoting Professor Dicey), vol. ii. pt. i. c. 1.

[2] For a detailed classification see F. W. Maitland, Constitutional History of England (1919), p. 422.

[3] *Vide Monypenny* v. *The Admiralty*, 1922 S.C. 706; Scots Act of first Parliament of Charles II. (Thomson's Acts, vii. 13).

[4] Ersk. i. 3, 1.

[5] *Ibid.*, i. 3, 14.

[6] *Vide infra*, para. 757.

[7] *Vide infra*, para. 766.

[8] *Vide supra*, para. 750.

[9] For a full list see Broom, Legal Maxims, 9th ed., p. 30 *et seq.*

[10] See para. 788, *infra*.

[11] See generally Maitland, Constitutional History of England (1919 ed.), p. 430 *et seq.*

[12] 1455, c. 41 is the first; Ersk. Inst. ii. 3, 14; Bell's Prin., s. 672.

to meet not merely the expenses of the Court, but also, *inter alia*, the salaries of ambassadors, judges, and the civil service.

756. With the accession of George III., Parliament for the first time secured a direct control over the personal expenditure of the Crown.[1] George III. gave up control of the greater part of his hereditary revenues (including Crown lands in England) in exchange for a fixed income of £800,000 a year. Out of this sum he had still to meet the expense of certain public services. Thereafter the sources of revenue still beyond Parliament's control (amongst them the hereditary revenues of Scotland)[2] were, on the one hand, gradually surrendered by the Crown; while, on the other, the sum voted by Parliament to the sovereign was relieved from the burden of maintaining public services. Accordingly at the present time the whole revenues of the Crown, from whatever source derived, are paid into the Consolidated Fund, thereafter to be appropriated to public purposes, and, in exchange, a grant from Exchequer is made in favour of the sovereign. The grant voted by Parliament to the sovereign is called the Civil List. The Civil List at present amounts to £470,000 per annum, of which £110,000 is appropriated to the privy purse, while the remainder is applied to the maintenance of the household.[3]

Section 6.—Property in the Crown.

Subsection (1).—*Paramount Feudal Superiority.*

757. All land in Scotland held on feudal tenure is held directly or indirectly of the Crown as paramount superior. Freehold or allodial tenure is, in Scotland, almost unknown. The only important instances of land not held on a feudal title derivative from the Crown[4] appear to be: (1) udal lands in Orkney and Shetland;[5] (2) lands acquired on a statutory title;[6] (3) certain property in church lands vested in the general trustees of the Church of Scotland;[7] and (4) lands forming Crown patrimony or the Principality of Scotland.

Subsection (2).—*Crown Patrimony.*

758. The patrimonial estates of the Crown consist of the lands, castles, strongholds, palaces, and other estates of the sovereign (excluding his present private estates),[8] whether annexed to the Crown by statute or otherwise acquired. "Annexation" was the process of

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[1] The first idea of a civil list is in 9 & 10 Will. III. c. 23.

[2] Surrendered by 1 Will. IV. c. 25; 1 Vict. c. 2; Bell's Prin., s. 672.

[3] 10 Edw. VII. & 1 Geo. V. c. 28, s. 2, and Schedule.

[4] Bell's Prin., s. 675, note; Ersk. ii. 3, 8; Menzies, Conveyancing, p. 472.

[5] Bell's Prin., s. 932.

[6] Lands Clauses (Scotland) Act, 1845 (8 & 9 Vict. c. 19); *Magistrates of Elgin* v. *Highland Rly. Co.*, 1884, 11 R. 950; *Magistrates of Inverness* v. *Highland Rly. Co.*, 1893, 20 R. 551.

[7] Church of Scotland (Property and Endowments) Act, 1925 (15 & 16 Geo. V. c. 33); but see s. 46.

[8] See para. 762, *infra*.

conjoining lands to the Crown by statute, such lands being declared inalienable by the sovereign, unless with the approval of Parliament. The first great Act of Annexation was 1455, c. 41. Its purpose was to restrain the unbounded liberality of the sovereign to his favourites, and to secure for him a revenue sufficient to maintain his royal dignity. The effect of this Act of Annexation was partially limited by subsequent statutes enabling the sovereign to feu his lands;[1] but it was finally provided in 1633 that no annexed land could be feued by the sovereign without the consent of Parliament, either by Act of Dissolution or by particular ratification.[2] The Act of 1633, taken with that of 1455, finally ensured that the annexed patrimony of the Crown could not be alienated or feued without consent of Parliament. In the same way, church lands, which after reverting to the Crown at the Reformation were erected into secular lordships, were resumed by the Crown in 1587 by a general Act of Annexation.[3] The patrimony of the Crown has now been given over to Parliament in exchange for a fixed sum of money paid annually.[4]

759. As the Crown holds *jure coronæ*, no infeftment is necessary to complete its title to land.[5] Hence when a Crown vassal's estate falls to the Crown by forfeiture it becomes consolidated *ipso jure* with the superiority.[6]

760. The management of Crown lands, now that these have been transferred from the sovereign to the control of Parliament, is vested in the Commissioners of Crown Lands.[7] On the transfer, the provisions of the Crown Lands Act, 1829,[8] as to dealing with Crown property in England, were extended to Scotland,[9] but these provisions are now largely replaced by others conferred by the Crown Lands Act, 1927.[10] The Commissioners have now power, *inter alia*, to sell Crown lands,[11] and to grant leases for not more than a hundred years of Crown lands,[12] special provisions being made for building [13] and mineral [14] leases. The management of Crown rights in the *solum* of the sea and in the foreshore, and in navigable tidal rivers is vested in the Board of Trade.[15] The Crown may acquire land on lease,[16] or by purchase,[17] through the Commissioners of Crown Lands.

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[1] 1457, c. 71; 1540, c. 116; 1584, c. 6 [2] 1633, c. 16.
[3] 1587, c. 29. [4] 1 Will. IV. c. 2. See para. 756, *supra*.
[5] This does not apply to the private estates of the sovereign (37 & 38 Vict. c. 94, s. 60), or to land held by a government department under powers conferred by statute.
[6] Ersk. ii. 3, 44; *Earl of Perth* v. *Lady Willoughby d'Eresby's Trs.*, 1871, 9 M. (H.L.) 83.
[7] 2 & 3 Will. IV. c. 112; 3 & 4 Will. IV. c. 69, ss. 2, 3; 8 & 9 Vict. c. 99; 14 & 15 Vict. c. 42, ss. 1, 2; 29 & 30 Vict. c. 62; 36 & 37 Vict. c. 36; 48 & 49 Vict. c. 79; 57 & 58 Vict. c. 43; 6 Edw. VII. c. 28; 17 & 18 Geo. V. c. 23. The Commissioners of Crown Lands were formerly the Commissioners of Woods and Forests (S.R. & O. 1924, No. 1370, p. 228).
[8] 10 Geo. IV. c. 50.
[9] 3 & 4 Will. IV. c. 69, s. 3.
[10] 17 & 18 Geo. V. c. 23.
[11] *Ibid.*, ss. 2, 3.
[12] *Ibid.*, ss. 4, 5.
[13] *Ibid.*, s. 6.
[14] *Ibid.*, s. 7.
[15] 29 & 30 Vict. c. 62, s. 7.
[16] 10 Geo. IV. c. 50, s. 47.
[17] *Ibid.*, s. 52.

761. Crown lands are generally exempted from imperial taxation,[1] and from rates.[2] This exemption extends only to property occupied by the Crown, or by persons using it for behoof of the Crown; [3] but the merely occasional use of such property for other purposes will not preclude its exemption.[4] In practice, however, the Crown waives its claim to exemption. As to local restrictions on the use of property, the view has been expressed that where the Crown acquires property from a subject proprietor, it will be bound by all local regulations, whether statutory or arising at common law, affecting that property.[5]

SUBSECTION (3).—*Private Estates of the Sovereign.*

762. The private estates of the sovereign are those lands held by the sovereign in his private as distinct from his public capacity. The distinction between lands held by the sovereign in his public and in his private capacity was not recognised till 1800, when the sovereign was enabled by statute [6] to hold lands in a private capacity. The law applicable to Crown patrimony does not apply to the private estates of the sovereign, which are held by him as a private citizen.

763. The private estates of the sovereign are those estates purchased by the king with money from the privy purse, or with any other moneys not appropriated to the public service, or acquired by the king as donee or successor of any of his ancestors or subjects.[7] The term "estates" includes both feus and leases. Such estates may be lawfully held by the king of himself as feudal superior. Once acquired by the king, the *dominium utile* of them is not *ipso facto* consolidated with the *dominium directum*.[8] Estates in Scotland held by the king under a subject superior must be vested in trustees appointed by him by instrument under the sign manual.[9] The king may dispone these estates by conveyance *inter vivos* or *mortis causa*. The execution of the deeds is regulated by special statutory provisions.[10] The sovereign's private estates are subject to rates and taxes.[11] All actions relating to such estates must be carried on in the name of a person appointed for that purpose by the king; and such person may both sue and be sued. If the private estates are vested in a trustee, the king may require him to convey the estates to himself or to a new trustee. If the trustee is unable or fails to do so, or has died, the king may appoint some person to

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[1] *Coomber* v. *Justices of Berks*, 1883, 9 App. Cas. 61; disapproving *Clerk* v. *Dumfries Commrs. of Supply*, 1880, 7 R. 1157.

[2] *Advocate-General* v. *Oliver*, 1852, 14 D. 356; *Glasgow Court House Commrs.* v. *Glasgow Parish Council*, 1913 S.C. 194; Armour on Valuation, chap. xiii.

[3] *Greig* v. *University of Edinburgh*, 1868, 6 M (H.L.) 97; Armour on Valuation, 2nd ed., pp. 212, 213; *Mags. of Helensburgh* v. *Brock*, 1905, 13 S.L.T. 98.

[4] *Fife County Council* v. *Mags. of Kirkcaldy*, 1920 S.C. 548.

[5] *Somerville* v. *Lord Advocate*, 1893, 20 R. 1050.

[6] 39 & 40 Geo. III. c. 88, s. 1.

[7] Crown Private Estates Act, 1862 (25 & 26 Vict. c. 37), s. 1.

[8] *Ibid.*, s. 4; 37 & 38 Vict. c. 94, s. 60.

[9] 25 & 26 Vict. c. 37, s. 4.

[10] *Ibid.*, s. 6.

[11] *Ibid.*, s. 8.

petition the Court of Session to have the estates transferred to the king or to a new trustee, and the decree of the Court effects a valid conveyance of the estates.[1]

Subsection (4).—*Principality of Scotland.*

764. The principality of Scotland consists of a dukedom and certain earldoms and lordships, of which the fee is in the sovereign and the usufruct is an appanage of the sovereign's eldest son. These territories consist partly of the patrimonial lands of the Bruces, Earls of Carrick, and of the High Stewards of Scotland, and partly of the forfeited lands of the Lords Boyd and the Lords of the Isles. In a charter of 10th December 1404 (not on record, but see MS. "State of Principality in H.M. Exchequer Office," printed in Abstract from Records, etc., concerning Stewartry, etc., Edinburgh, 1824) of a liferent of the stewartry granted by Robert III. in favour of his eldest son James, Steward of Scotland, the stewartry lands are—the baronies of Renfrew, Cunningham, and Kyle Stewart (Kyle Senescalli), in the sheriffdom of Ayr; the baronies of Ratho and Innerwick, in the sheriffdom of Edinburgh; the islands of Bute, Arran, and the Cumbraes; the lands of Cowall and Knapdale; the lands of the earldom of Carrick; and the lands of Kyle Regis. The first creation of a permanent principality was by an Act of Parliament of 1469,[2] by which James III., with consent of Parliament, united, incorporated, and annexed, in favour of the eldest sons of the kings of Scotland, the lordship of Bute with the castle of Rothesay, the lordship of Cowall with the castle of Dunoon, the earldom of Carrick, the lands of Dundonald with its castle, the barony of Renfrew with its lands and tenandries, the lordship of Stewarton, the lordship of Kilmarnock with its castle, the lordship of Dalry, the lands of Noddisdale, Kilbyd, Narristoun, and Caverton, and of Frarynzan Drumcoll, and Trebauch with its fortalice, along with that land of Teilling and annualrent of Brechin which previously belonged to Thomas, eldest son of Robert Lord Boyd.

765. From time to time portions of the principality have been dissolved from it with the sanction of Parliament. Thus, in 1621, the lands and earldom of Arran; in 1633, the lands and barony of Beill, in the sheriffdom of Edinburgh, the barony of Gogosyde, and lands of Largs, etc., in the bailiary of Cunningham; in 1641, Kilbirnie, Easter Greenock, Fairlie, Crevoche, Wester Greenock Shaw, Johnstone, Drumelling, Spangs Cunyngham, Bonyngton, Lochtulloche, Deans, Boighall, Starlaw, etc.; in 1645, the earldom of Cassilis, baronies of Leswalt and Dunure, the heritable offices of the bailiary of Carrick and of keeper of the castle of Lochdone, the penny-lands extending to a five-pound land, and the patronage of the provostry and prebendary of Maybole, with the superiority of all lands and tenements belonging

[1] 25 & 26 Vict. c. 37, s. 11. [2] 1469, c. 3.

thereto, were so dissolved. All the remaining lands of the principality have been feued, and its revenues now consist of feu-duties and casualties. When there is a prince who is the eldest son of the sovereign, all charters in favour of the vassals of the principality run in his name, as Prince and Steward of Scotland, etc., etc. When there is no such prince, the principality, though not merged in the sovereignty, remains with the sovereign, who grants charters to its vassals as Prince and Steward of Scotland, and not as sovereign. In all cases the principality charters pass the Great Seal, and are recorded in the Great Seal Register along with ordinary Crown charters. The principality passes to the son and heir of the sovereign on his birth, but by the terms of its original institution, and the analogy of the appanages of Cornwall, etc., it apparently does not descend to the grandson of the sovereign on the predecease of the son.[1]

Subsection (5).—*Regalia.*

(i) *In General.*

766. Stair defines *regalia* [2] as "those things . . . which the law appropriateth to princes and states and exempteth from private use, unless the same be expressly granted and disponed by the king"; [3] Erskine's definition is: "All rights that the king has in or over the estates or persons of his subjects." [4] These definitions are wide enough to include the several branches of the royal prerogative; but the term *regalia* is ordinarily limited to rights reserved by the Crown over land and other heritage.[5] The characteristic common to *regalia* is that none are ever presumed to pass in a conveyance of property, unless expressly mentioned, and a barony title, though a good title for prescription of *regalia*, does not appear to carry them of itself.[6]

(ii) *Regalia Majora and Minora.*

767. *Regalia* are divided into *majora* and *minora*; the *regalia majora*, viz. those rights which the Crown holds in right of sovereignty as guardian of the public interest, are not communicable by the Crown to the subject; the *regalia minora*, viz. those rights which are held by the Crown as absolute proprietor for its own profit, may be conveyed to the subject. The attempt, however, to distinguish *regalia majora* and *minora* in classification is frustrated by the fact that the two sorts of right may be coexistent in the same subject at the same time. The more important *regalia* include the Crown's rights in the sea and

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[1] "Memorial to show that the eldest son of the King has right to the Principality," 1791. "Abstract from the Records concerning the Stewartry," etc., 1824.

[2] On Regalia, *vide* Rankine, Land-Ownership, 4th ed., p. 247 *et seq.*

[3] Stair, ii. 3, 60. [4] Ersk. Inst. ii. 6, 13.

[5] In particular land held on feudal tenure; thus salmon fishings in udal lands are not *inter regalia*; *Lord Advocate* v. *Balfour*, 1907 S.C. 1360.

[6] *Lord Advocate* v. *Cathcart*, 1871, 9 M. 744; *Duke of Montrose* v. *Macintyre*, 1848, 10 D. 896.

foreshore, the *alveus* of navigable rivers, highways, ports and harbours and ferries, and salmon fishings.[1] The remaining *regalia* are dealt with in the succeeding sections.

(iii) *Forests.*

768. Forests,[2] by which are meant large tracts of ground, whether covered with wood or not, in which deer have been in use to be kept, are *inter regalia* in the sense that no Crown charter of land in which a forest lies carries the forest itself without express mention.[3] The Crown might also confer on private lands the privilege of a royal forest, which was, briefly, that all cattle or sheep found straying within the forest were forfeited, two-thirds going to the Crown, and the remainder to the keeper of the forest.[4] These privileges became so burdensome on the lieges that in 1680 the Court made a representation to the Crown against granting of new forests.[5] Where the keeper of a forest was one of the co-proprietors of a common pasturage marching therewith, he was held entitled, in a question with his co-proprietors, to drive back into the forest deer which had strayed on the common.[6] But it was held in a later case that the keeper of a royal forest was not entitled to enter on neighbouring lands for the purpose of driving back deer which had strayed from the forest.[7] The same case decided, notwithstanding a *dictum* of Lord Stair to the contrary,[8] that the right of killing deer is not *inter regalia*. The result is that forestry rights now are practically in desuetude, or at least are no longer distinguishable from the right of every man to kill the deer or other game on the lands possessed by him. Where, in a feu-charter relating to certain lands, shealings, and grassings, a superior reserved "all the deer that may be found hereafter within the bounds of the said shealings," this was held to confer a right to deer captured or killed on the lands, not a right of stalking them.[9]

(iv) *Gold and Silver Mines.*

769. All mines of gold and all silver mines, "when three halfe pennies of silver may be fined out of the pound of leade," are, by 1424, c. 12, declared to belong to the king, and they form part of the *Regalia minora*. They remained inalienable until near the end of the sixteenth century, when by an Act, 1592, No. 12,[10] they were allowed to be feued to the proprietor of the ground, or to strangers, on the owner's refusal, under burden of the delivery to the Crown of one-tenth of what is brought up. This permission is held to imply a right to the proprietor

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[1] See FERRIES; FISHINGS; PORTS AND HARBOURS; ROADS AND BRIDGES; WATER RIGHTS.

[2] Bell's Prin., s. 670 (2); Ersk. ii, 6, 14; Bankt. i, 562; 1685, c. 20; 1594, c. 124 (as to killing deer in time of snow).

[3] Ersk. ii. 6, 14.

[4] 1535, c. 11; 1579, c. 84; 1592, c. 130.

[5] *Marquis of Athole* v. *Laird of Faskellie*, 1680, Mor. 4653.

[6] *Robertson* v. *Duke of Athole*, 22nd May 1810, F.C.; aff. 1st December 1814, F.C. App.

[7] *Duke of Athole* v. *Macinroy*, 1862, 24 D. 673.

[8] Stair, ii. 3, 68.

[9] *Hemming* v. *Duke of Athole*, 1883, 11 R. 93.

[10] Thomson's Acts, iii. 536.

to demand such a feu in his character of owner of the soil,[1] and it is not restricted to immediate vassals of the Crown, but extends to all proprietors of land, though holding of subject-superiors.[2] Unless an intention is shewn to keep the estates separate, a grant so made to the proprietor unites the mines and the lands, so that an adjudication of the lands carries the mines in preference to a later adjudication of the mines; [3] and mines so acquired were held to be included in a general deed of entail.[4] But if not expressly mentioned in a conveyance of the lands they do not pass as "parts and pertinents." [5]

(v) *Unclaimed Wreck.*

770. According to early Scots law, all wrecks became the property of the Crown [6] unless some living creature, man or beast, were found on board; in which event, the owner was entitled to claim the wreck within a year and a day.[7] The rule that the owner's claim to the wreck depended on finding a living creature on board was obsolete by 1725.[8] The Crown's claim to wreck was relaxed in favour of foreign ship-owners, if the relaxation was reciprocated by the State of which they were nationals.[9] The present law governing wrecks is largely the creature of statute, and is contained in the Merchant Shipping Act, 1894,[10] and other statutes.

771. In the 1894 Act "wreck" is defined as including "jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water." [11] Jetsam consists of goods cast into the sea, to lighten a ship in danger of sinking, which, nevertheless, is lost; flotsam, of those goods, belonging to a ship which has been lost, which are found floating in the water; lagan (or ligan), of those goods which have sunk at the loss of the ship, but the position of which is marked by buoy or cork, so that they may be found again. All unclaimed wreck belongs to the Crown, or its grantee.[12] A grantee must deliver to the local receiver of wreck particulars of his title to unclaimed wreck within the district and of his address, and the receiver must give notice within forty-eight hours to such grantee of any wreck taken into his possession.[13] When

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[1] *Earl of Hopeton* v. *Officers of State*, 1750, Mor. 13527.
[2] *Duke of Argyle* v. *Murray*, 1739, Mor. 13526.
[3] *Oughterlony* v. *Earl of Selkirk*, 1755, Mor. 164.
[4] *Earl of Breadalbane* v. *Jamieson*, 1875, 2 R. 826.
[5] Stair, ii. 3, 60; *Lord Advocate* v. *Sinclair*, 1865, 3 M. 981; aff. 5 M. (H.L.) 97; *Lord Advocate* v. *M'Culloch*, 1874, 2 R. 27; *Earl of Breadalbane* v. *Jamieson*, *supra*.
[6] Bell's Prin., s. 1292; Stair, iii. 3, 27; Ersk. ii. 1, 13.
[7] Alex. II. c. 25; *Hamilton* v. *Cochran*, 1622, Mor. 16791.
[8] *Monteir* v. *Agnew*, 1725, Mor. 16796.
[9] 1429, c. 124; *Jacobson* v. *Earl of Crawford*, 1674, Mor. 16792.
[10] 57 & 58 Vict. c. 60, ss. 510–37; *vide* also 12 Anne, sess. 2, c. 18; 4 Geo. I. c. 12; 5 Geo. I. c. 11, s. 13.
[11] 57 & 58 Vict. c. 60, s. 510.
[12] *Ibid.*, s. 523; *Commrs. of Customs* v. *Lord Dundas*, 25th May 1810, F.C.; *Marquis of Breadalbane* v. *Smith*, 1850, 12 D. 602; *Lord Advocate* v. *Hebden*, 1868, 6 M. 489.
[13] 57 & 58 Vict. c. 60, s. 524.

a year has expired, without the wreck being claimed by an owner, the receiver must deliver it to the grantee if there is one; if there is not, the wreck is sold and the proceeds applied for behoof of the Crown.[1] As to the rights of salvors of wrecks, see SALVAGE.

(vi) *Treasure Trove.*

772. The right to treasure trove is one of the *Regalia Minora*, and as such is vested in the Crown. It is communicable to a subject, but only by express grant, not being included among those rights which a barony charter carries by implication. Similarly, if a subject having a grant of treasure trove from the Crown feus out his land, the right to any treasure which may be found in it remains with the superiority unless it be expressly conferred upon the vassal.[2]

773. The following English definition of treasure trove is equally applicable to Scotland: "Treasure trove is where any gold or silver in coin, plate, or bullion is found concealed in a house or in the earth or other private place, the owner thereof being unknown, in which case the treasure belongs to the king or his grantee having the franchise of treasure trove: but if he that laid it be known or afterwards discovered, the owner and not the king is entitled to it, this prerogative right only applying in the absence of an owner to claim the property. If the owner, instead of hiding the treasure, casually lost it, or purposely parted with it, in such a manner that it is evident he intended to abandon the property altogether and did not purpose to resume it on another occasion, as if he threw it on the ground or other public place, or in the sea, the first finder is entitled to the property as against everyone but the owner, and the king's prerogative does not in this respect obtain. So that it is the hiding, and not the abandonment, of the property that entitles the king to it."[3] This right in the sovereign, as against both the owner of the soil and the finder, probably originated with the feudal law, which reserved to the king a supreme right in all the lands of his subjects. It would appear, however, to be rather of the nature of an exaction which the Crown's power enabled it to enforce, than the outcome of any equitable principle, although the right has been said to have been conferred upon the Crown with a view to preventing strife and contention as to the ownership of finds. If the owner of the treasure trove or his representatives are traceable, the Crown's claim is excluded thereby.[4]

774. To bring a find within the operation of the law of treasure trove, it is essential (1) that it consist of gold or silver; (2) that there be proof or sufficient presumption of its having been hidden or con-

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[1] 57 & 58 Vict. c. 60, s. 525.

[2] Craig, i. 16, 40; Stair, ii. 1, 5; ii. 3, 60; Ersk. ii. 1, 12; Bell's Prin., s. 1293; *Cleghorn* v. *Baird*, 1696, Mor. 13522; *Gentle* v. *Smith*, 1788, 1 Bell's Ill. 374.

[3] Chitty's Prerogatives of the Crown, p. 152; Kerr, Blackstone's Comm. i. 268.

[4] *Cleghorn* v. *Baird*, *supra*; More's Notes to Stair, cxlvi.

cealed: (3) that the owner or his representatives be unknown and unascertainable. Attempts have been made in Scotland to extend the scope of the Crown's right to articles not of gold or silver.[1] The circumstances in which the treasure is found must be such as to point to its having been intentionally concealed, or having formed part of a hidden hoard, and not to its having been merely accidentally lost or purposely abandoned. Thus the objects must be found *in* the earth, or in some secret recess or hiding-place in a wall or house, not on the surface of the earth or in the sea. Where a single object, such, for example, as a ring, is found, even in the earth, it is thought that it is not necessarily treasure trove, if circumstances point to the probability of its having been originally lost accidentally.[2] In the case of valuable objects of gold or silver interred along with dead bodies, it is questionable whether such, on their subsequent discovery in a later age, come properly within the definition of treasure trove, seeing that deliberate abandonment on the part of the owner is implied and the element of concealment is absent. The definition of treasure trove quoted above[3] was adopted and applied in *Attorney-General* v. *Trustees of the British Museum*.[4] The Crown there laid claim to certain gold articles found buried and lying all together in a field near Lough Foyle, in the North of Ireland, in the year 1896. It was maintained, in answer, that the circumstances pointed to the articles not having been either hidden or abandoned, but to their having been deposited as a votive offering in honour of a marine deity. The claim of the Crown was upheld, the Court holding that the inference from the facts was that the articles were "intentionally concealed for the purpose of security."[5]

775. Treasure trove found in lands the proprietors of which do not possess by grant the right to it, is claimed in Scotland by the King's and Lord Treasurer's Remembrancer, or the local procurator-fiscal on his behalf. The concealment of treasure trove, though once a crime in Scotland,[6] appears not to be so now;[7] it is still a crime in England.[8]

(vii) *Ownerless Subjects.*

776. All subjects derelinquished by their owner are *inter regalia*.[9] The maxim *quod nullius est, fit domini regis*, is to be distinguished from

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[1] *Vide* Proceedings of the Society of Antiquaries of Scotland, xxv. 64. Such claims involve undue extension of the Crown's rights.

[2] See opinion of Sir R. B. Finlay and C. H. Blakesley, Proceedings of the Society of Antiquaries, 2nd series, xiv. 222.

[3] Chitty, *cit. supra*.

[4] [1903] 2 Ch. 598, per Farwell J. at p. 608.

[5] *Vide* Juridical Review, xv. 267. For a more recent case (1911) in which Roman coins were claimed as treasure trove, *vide* Report by Dr. (now Sir) George Macdonald in Journal of Roman Studies, 1912; Archæologia Æliana, viii. 153 *et seq.*, by Forster; Proceedings of London Society of Antiquaries, 2nd May 1912, by Haverfield; *vide* also The Times, 3rd June 1886, with regard to treasure trove found at Aberdeen.

[6] Balfour, Practicks, p. 517.

[7] Hume, i. 62, 63.

[8] Stephen's Digest of the Criminal Law, p. 308; Kerr, Blackstone's Comm. iv. 107, *vide* Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 36; *Attorney-General* v. *Moore*, [1893] 1 Ch. 676.

[9] Stair, ii. 1, 5; iii. 3, 27; Ersk. ii. 1, 12; Bell's Prin., ss. 1288, 1291.

the principle of occupation, by which subjects in their natural state which have never had an owner belong to the person who first takes possession of them. This maxim, the principle underlying which rests on public expediency, applies to property abandoned or presumed to be abandoned by its owner. It operates only when the subject can be held to be not merely unclaimed, but derelinquished by its owner.[1] Till then, subject to police regulations,[2] the finder is entitled to possession against all but the true owner.[3]

(viii) *Right of the Crown as Ultimus Hæres.*

777. According to the civil law, the property of a deceased person, who had not disposed of his estate by will and who left no *hæres ab intestato*, either civil or prætorian, was *bona vacantia*.[4] Such property was open to *occupatio*, and it does not appear that the State originally claimed it. According to the law of Scotland, however, *bona vacantia* are *inter regalia minora*. When, therefore, a person dies intestate without heirs lawfully begotten of his body, and there is no person who can prove propinquity to him in the remotest degree so as to succeed to his property, such property, both heritable and moveable, falls to the Crown as *ultimus hæres*, but always under burden, so far as the value of the property avails, of the debts of the deceased.[5] There are two possible cases—(1) where an heir or heirs exist but cannot be found, and (2) where an heir or heirs do not exist, as in the case of a bastard [6] who has in fact no descendants, and, in the eye of the law, no father. In the latter case the widow of the bastard is entitled to terce and *jus relictæ*, even though the Crown should succeed as *ultimus hæres*. The Crown's right as *ultimus hæres* is a caduciary right, not a right of succession;[7] accordingly the Crown cannot take, as *ultimus hæres*, under a conditional institution of "heirs."[8] But the right to challenge a deathbed deed has been successfully claimed by the Crown, that being a privilege not confined to heirs of line, but belonging to any heir *alioqui successurus*.[9]

778. In the case of heritable property held of the Crown falling to the Crown, there is *ipso jure* consolidation; but where the property is held of a subject-superior, it is necessary to interpose a donatory, as the Crown cannot hold of a subject. The donatory, like the Crown, is burdened with his predecessor's debts only to the value of his estate.[10] Where it is necessary to interpose a donatory, or where the Crown makes a gift of estate falling to it as *ultimus hæres*, power is given in the deed of

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[1] *Sands* v. *Bell and Balfour*, 22nd May 1810, F.C.
[2] *E.g.* 55 & 56 Vict. c. 55, s. 412.
[3] Bell's Prin., s. 1291.
[4] Dig. 49, 14, 1, 2; 44, 3, 10, 1.
[5] M'Laren, Wills and Succession, 3rd ed., i. 79, 80; Stair, iii. 3, 47; Ersk. iii. 10, 2, 4; Bell's Dict., "Last Heir."
[6] Stair, iv. 12, 1; Ersk. iii. 10, 8.
[7] Bell's Prin., s. 1669.
[8] *Torrie* v. *King's Remembrancer*, 1832, 10 S. 597; M'Laren, Wills and Succession, 3rd ed., ii. 763.
[9] *Torrie* v. *King's Remembrancer*, *supra*, per Lord Glenlee at p. 603; *Goldie* v. *Murray*, 1753, Mor. 3183.
[10] *Galbraith* v. *Deans*, 1685, M. 1354.

gift to institute an action of declarator of gift of *ultimus hæres*, or of declarator of bastardy, and it is necessary for the donatory to do so to complete his title. The action is raised by the donatory as such, the deed of gift being set forth in the instance; and the lieges and all others having or pretending to have an interest, and, in the case of bastardy, the person or persons who would by law have succeeded to the estates, heritable and moveable, of the bastard had he been begotten in lawful wedlock, together with the widow of the bastard, if he left one, are called as defenders. The declarator is to the effect that the estates, which are described, pertained to the deceased, fell into the hands of the Crown, were at the gift and disposal of the Crown by reason of the deceased's death without heirs, or by reason of bastardy, have been gifted to the donatory, and are in consequence his in all time coming. After decree of declarator is obtained, the donatory, in the case of heritable property, obtains a letter under the quarter seal charging the superior to give him an entry.

Section 7.—The Crown as Litigant.

Subsection (1).—*Procedure in Actions by or against the Crown.*

(i) *History.*

779. The practice of the Crown in Scotland appearing as a litigant in its own supreme Court was established at latest by the beginning of the sixteenth century. Since then, this procedure appears to have fallen into three chronological phases:—[1]

Originally the king appears to have sued in his own name. This practice is found as late as 1541, but seems to have been departed from about the middle of the sixteenth century.[2] No instance, however, exists in the books of the king being called in his own name as defender.[2] The power to convene the Crown as defender may have emerged only when Crown suits ran not in the king's name, but in that of his Officers of State.

780. About the middle of the sixteenth century, the practice arises of the king being represented in litigation by his Officers of State.[3] The Officers of State varied from time to time, but included the Keeper of the Great and Privy Seals, the Lord Clerk-Register, the Lord Justice-Clerk, the Treasurer, Secretary, and Lord Advocate.[4] Where the Officers of State appeared for the Crown, they were not named individually. Though service on all the Officers of State might be effected through the Lord Advocate,[5] he was only one of the lesser Officers,[6] and never appeared by himself on the Crown's behalf unless authorised to do so by special mandate.[7] The Officers of State defended as well as pursued actions on the king's behalf,[8] and they came to be regarded as the proper defenders

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[1] *King's Advocate* v. *Lord Dunglas*, 1836, 15 S. 314, per Lord Medwyn at p. 324 *et seq.*
[2] Balfour, Practicks, p. 291, cc. 9, 10; Lord Medwyn, *supra*, at pp. 325, 326.
[3] *Ibid.*, pp. 331–36.
[4] *Ibid.*; Bell's Dict., "Officers of State."
[5] Balfour, Practicks, p. 296.
[6] Lord Medwyn, *supra*, at p. 335.
[7] *Ibid.*, 328, 338; also in 1842, 9 Cl. & F. 173; *Lord Advocate* v. *Moncrieff*, 1693, Mor. 3460, 7905.
[8] Lord Medwyn, *supra*, at p. 327.

to call when the Crown was sued by a subject.[1] By the close of the sixteenth century their duty to sue and be sued in the king's interest is recognised by statute, and the principle is recognised that the king's interest shall not be prejudiced by their negligence in the conduct of his causes.[2] The appropriateness of the Crown being represented by the Officers of State is explained by the fact that any claim against the Crown was likely to be admitted or rejected on their advice.[3] As Crown nominees in Parliament, they could represent the king in a degree impossible in England, where no nominated officers existed.[4] There appears to be no reported instance where the Officers of State, convened as defenders on behalf of the Crown, took the plea of no jurisdiction.

781. Though he was originally a lesser Officer of State, it became increasingly convenient for the Crown after the Union to sue and be sued through the Lord Advocate. Already the Lord Advocate could accept service on behalf of the remaining Officers of State; if authorised by special mandate, he might also represent the Crown alone; through the decline or abolition of the greater offices his relative importance as an Officer of State increased. To complete the recognition of the Lord Advocate as the proper representative of the Crown in litigation, it remained only to remove the necessity for him to produce a special mandate. This was the effect of the Crown Suits (Scotland) Act, 1857,[5] which, in enacting that the Lord Advocate should be the proper representative of the Crown in litigation,[6] with the authority of the sovereign or public department interested,[7] withdrew the requirement that he should produce his mandate.[8] The practice of convening the Officers of State on behalf of the Crown continued after the Act of 1857, but appears gradually to have fallen into disuse. Though it was still discussed as a competent method in 1893,[9] there is no reported instance of its use after 1870.

(ii) *Present Procedure.*

782. This is regulated by the Crown Suits (Scotland) Act, 1857.[10] The purpose of the Act is not to enlarge the right to sue the Crown, but to provide procedure for such actions by and against the Crown as could have been competently raised before the Act.[11] The privileges of the Crown under the pre-existing law appear not to be abridged.[12] The Lord Advocate is the proper person to sue or be sued on behalf of the Crown

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[1] *King's Advocate* v. *Lord Dunglas*, 1836, 15 S. 314, per Lord Medwyn at p. 329.

[2] 1600, c. 14; Ersk. Prin. i. 2, 18; Inst. i. 2, 27; *Somerville* v. *Lord Advocate*, 1893, 20 R. 1050, per Lord Trayner at p. 1061; cases, Mor. 7865–7870.

[3] Lord Medwyn, *supra*, at p. 336.

[4] Dicey and Rait, Thoughts on the Scottish Union, p. 10.

[5] 20 & 21 Vict. c. 44.

[6] *Ibid.*, s. 1.

[7] *Ibid.*, s. 2.

[8] *Ibid.*, s. 3; though a mandate is still necessary.

[9] *Somerville* v. *Lord Advocate*, 1893, 20 R. 1050, at p. 1075. It has, however, been held that the Officers of State do not represent the Crown in regard to matters of revenue; *Sanderson* v. *Officers of State*, 1867, 3 S.L.R. 214.

[10] 20 & 21 Vict. c. 44; *vide* also Maclaren, Court of Session Practice, p. 197 *et seq.*

[11] *Macgregor* v. *Lord Advocate*, 1921 S.C. 847, at p. 848.

[12] *Lord Advocate* v. *Meiklam*, 1860, 22 D. 1427, per Lord Justice-Clerk Inglis at p. 1433.

or any of the public departments,[1] except the Admiralty.[2] Before instituting or defending any such action the Lord Advocate must have the authority of the King or of the public department concerned[3]; but it is not competent for any private party to such an action to challenge the instance of, or title to defend the action, or the title of the Lord Advocate to prosecute or defend it, on the ground that such authority has not been granted, or is not produced or averred.[4] A change in the person holding the office of Lord Advocate does not affect any such action.[5]

783. In actions relating to the private estates of the Sovereign, the Sovereign is represented by a trustee appointed for that purpose.[6]

Subsection (2).—*Forum.*

784. The Crown may decline to be convened in any *forum* but the Court of Session[7] (or apparently the Bill Chamber).[8] Even when the Crown has acquired heritage from a private owner in respect of which he was subject to an inferior Court, the Crown, as his successor, cannot be convened there.[9] The Crown may be convened in an inferior Court, only when subjected to its jurisdiction by statute.[10] Otherwise it appears not to be safe to sue the Crown in an inferior Court, even when the Crown has prorogued its jurisdiction. "Prorogation is not admitted in the king's causes, for the interest of the Crown cannot be hurt by the negligence of its officers in the management of processes."[11] The Crown may remove its causes from the very Court in which its officers have brought them.[12]

Subsection (3).—*Competency of Actions against the Crown.*

(i) *General Competency.*

785. This department of law is rendered peculiarly difficult of ascertainment in Scotland for three reasons: (1) the scantiness of authority, especially in modern times; (2) the refusal of Stair[13] and other institutional writers to deal with constitutional law; and (3) the cross-currents of English legal influence since the Union of 1707.

786. In origin and theory the position of the Crown in Scotland appears to have been the same as its position in England; theoretically, the Crown cannot be made subject to the jurisdiction which flows from itself.[14] Thus when the king sat in Court in person, as he did till the

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[1] 20 & 21 Vict. c. 44, s. 1; Court of Exchequer (Scotland) Act (19 & 20 Vict. c. 56), s. 22.
[2] Admiralty Suits Act, 1868 (31 & 32 Vict. c. 78), s. 4. [3] 21 & 22 Vict. c. 44, s. 2.
[4] *Ibid.*, s. 3; *Commrs. of Woods and Forests* v. *Maitland*, 1860, 23 D. 216.
[5] *Ibid.*, s. 5. [6] *Supra*, para. 762.
[7] *A.* v. *B.*, 1534, Mor. 7321; Balfour, Practicks, p. 267; *Somerville* v. *Lord Advocate*, 1893, 20 R. 1050; *Mags. of Helensburgh* v. *Brock*, 1905, 13 S.L.T. 98.
[8] *Carlton Hotel* v. *Lord Advocate*, 1921 S.C. 237.
[9] *Somerville* v. *Lord Advocate*, 1893, 20 R. 1050, at pp. 1060, 1064, 1067, 1072, 1075.
[10] *Somerville* v. *Lord Advocate* (*supra*), at pp. 1073, 1067.
[11] Ersk. Inst. i. 2, 27 (note, ed. Badenoch Nicholson).
[12] 1600, c. 14; *Eyres* v. *Hunter*, 1711, Mor. 7596. [13] i. 1, 23. [14] Ersk. i. 3, 1.

close of the fifteenth century,[1] his judges' commissions were theoretically suspended *pro tempore*.[2] The practice of the Crown in Scotland from an early date, differing from the practice in England, appears to have been to concede the right to be convened by subjects in its own supreme Court. According to the feudal law, each lord could sue his vassal in his own Court, but he could only be sued by a vassal in the Court of his own overlord. There being no lord over the king, he could not, according to English law, be convened in any Court.[3] But in Scotland it was a "privilege of the royal sceptre" that the king might be judge in his own cause,[4] at any event in questions arising from the feudal tie. The origin of the right to sue the Crown may be found in the fact that the submission of the king's causes to the Court continued even after the king ceased to exercise his privilege of sitting as judge in them: and this concession from the Crown may by long usage have hardened into a right against it, thereafter alterable only by statute.[5]

787. It is now beyond doubt that the Crown may be convened as defender, generally, by subjects [6] in the Court of Session.[7] "I do not think," says Lord M'Laren, "that it ever was doubted in Scotland that the Crown might be called as defender in a proper action, either through the Officers of State collectively or through the King's Advocate or other officer representing the Crown in the matter of the action; and the decision reported by Balfour,[8] which negatives the jurisdiction of the inferior judges, also asserts inferentially that his Highness or his advocate, as representing the king, may be convened in the Court of Session in actions and pleas at the instance of any private person." [9] This conclusion appears to be confirmed by the habitual and presumably deliberate omission of the Crown, when called as defender, to take the plea of no jurisdiction, unless on special grounds. The absence of any procedure such as Petition of Right together with the omission of the Crown, when convened, to take the plea of no jurisdiction seems to justify the conclusion that the Crown is, except in special instances, in the same position as a subject-defender. Thus the Court gave decree against the Crown in declaratory actions relating to rights of patronage [10] and valuation of teinds,[11] and in petitory actions for compensation in respect of rights of jurisdiction given up under the Heritable

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[1] Acts of Lords of Council in Civil Cases, 1496–1501, introd. xlix.

[2] "No judge hes any power quhere the King is present, but they all loss ther light lyke starrs quhen the sun shynes, and their power quhik they have from him onlie is suspendit." —Hope's Greater Practicks, v. 1, quoted *ibid.*, lii.

[3] Pollock and Maitland, History of English Law, i. 502.

[4] Craig, *Ius Feudale*, iii. 7, 12.

[5] Ersk. i. 1, 43; i. 3, 1.

[6] Not necessarily by aliens; *Poll* v. *Lord Advocate*, 1899, 1 F. 823, per Lord Kyllachy at pp. 827–28.

[7] *Somerville* v. *Lord Advocate*, 1893, 20 R. 1050, at p. 1075, 1072; *A.* v. *B.*, 1534, Mor 7321; Balfour, Practicks, p. 267; Mackenzie, Observations, p. 311 (on 1600, c. 14).

[8] Balfour, p. 267.

[9] *Somerville* v. *Lord Advocate, supra*, at p. 1075.

[10] *Graham* v. *Officers of State*, 1758, Mor. 9927; *Haddington* v. *Do.*, 1778, Mor. 9940; *Earl of Home* v. *Do.*, 1758, Mor. 10777.

[11] *Drymen* v. *Officers of State*, 1757, Mor. 10675; *Thomson* v. *Do.*, 1763, Mor. 10687.

Jurisdictions (Scotland) Act, 1747,[1] for payment of debts due by an attainted person out of his estate forfeited to the Crown,[2] and generally for pecuniary claims.[3]

(ii) *Actions relating to the Prerogative.*

788. While it is generally competent to convene the Crown as defender, there does not appear to be any authority in Scotland for the view that an action will lie against the Crown in respect of acts done or omitted to be done in virtue of the prerogative. The extent of the prerogative must first be ascertained;[4] and while its extent tends to coincide with the extent of the prerogative in England,[5] it is not necessarily to be assumed that the measure of the prerogative in the two countries, at any rate in relation to private law,[6] is identical.[7] By prerogative is meant the remanent authority inherent in the Crown, and not such authority as is conferred on it or specifically transferred from it to some other depositary by Act of Parliament. The former only is the true prerogative; in respect of the latter, the Crown is subject to the Court in England,[8] and, it would seem also, in Scotland.[9] Thus where the Crown is in breach of a statutory obligation imposed upon it, the Court may pronounce an order for specific performance against the department concerned; and the view has been expressed[10] that in such circumstances the Court may pronounce an order for specific performance on an officer of the Crown under s. 91 of the Court of Session Act, 1868;[11] though a criticism of this view might be that the Crown, not being expressly mentioned in the Act, is not bound by s. 91.

789. The question of the right of the subject to obtain an order for specific performance against the Crown itself as distinguished from a Minister of the Crown acting under powers conferred upon him as representing his department has not been the subject of judicial decision or comment in Scotland. Where an Act of Parliament specially empowers the Crown to do some act, which before the passing of the Act

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[1] 20 Geo. II. c. 43; *Duke of Douglas* v. *King's Advocate*, 1748, Mor. 7695.

[2] *Mackenzie* v. *H.M. Advocate*, 1754, Mor. 220.

[3] *Reid* v. *Officers of State*, 1747, Mor. 1355; *Duke of Athole* v. *H.M. Postmaster-General*, 1870, 8 S.L.R. 66.

[4] *Buchan* v. *Officers of State*, 1828, 3 W. & S. 268; *vide Manners and Miller* v. *King's Printers, ibid.*, and in 1823, 2 S. 275; *Muirhead* v. *Glasford*, 16th May 1809, F.C.; *Monypenny* v. *The Admiralty*, 1922 S.C. 706, at pp. 709 (argument), 711.

[5] *Buchan* v. *Officers of State, supra*, per Lord Chancellor at p. 279 *et seq.*

[6] The prerogative outside the domain of private right, as it exists in England, appears tacitly to have been accepted in Scotland; though the Act of Union, 1707 (6 Anne, c. 2), did not in terms provide for its acceptance (but see Article XVIII.).

[7] *Vide infra*, para. 791, for a divergence in the prerogative according to English and Scots law.

[8] *Rex* v. *Commrs. of Special Purposes of Income Tax*, [1920] 1 K.B. 26, per Earl of Reading C.J. at p. 37; *Reg.* v. *Commrs. of Special Purposes on Income Tax*, 1888, 21 Q.B.D. 313.

[9] *Carlton Hotel* v. *Lord Advocate*, 1921 S.C. 237.

[10] *Ibid.*, per Lord Salvesen at p. 249 (Lord Dundas reserved his opinion).

[11] 31 & 32 Vict. c. 100.

it was entitled to do by virtue of the prerogative, then the prerogative is to that extent curtailed, and the Crown is bound by the provisions of the Act.[1] It may be questioned whether, according to the old law in Scotland, the power to issue an order for specific performance against the Crown was limited to cases where the Crown was in breach of a statutory duty. From *Duke of Buccleuch* v. *Officers of State* [2] it appears to be implied that the Court might pronounce such an order against the Crown for execution of a duty at common law.

SUBSECTION (4).—*Substantive Rights of the Crown in Litigation.*

790. This subsection deals only with the more important rights in relation to litigation which the Crown has in contrast to the subject, by virtue of its prerogative.

(i) *The Crown and Statute Law.*

791. (1) *Public General Acts.*—The position of the Crown in relation to statute law in Scotland differed radically in origin from its position in England. The English rule is summarised in the proposition that "the King is not bound by statute unless named therein." [3] The Scots rule, before the Union of 1707, appears to have been that the Crown was bound by statute equally with its subjects. Since 1707, however, the English rule has influenced Scots law, with the result that statutes passed since then are construed differently from Acts of the Scots Parliament.[4] The general rule now is that there is an antecedent improbability that the Crown is bound by any particular statute. To bind the Crown, there must be express declaration, or clear intention; but this requirement varies in stringency according to the subject-matter of statute. Thus the Crown will not be bound by penal or taxing statutes, unless expressly mentioned therein.[5] In the case of other statutes, "all legislation being primarily for the subject and not for the Crown, you must in some way or other gather that the Crown means to be bound;" [5] but in the case of statutes, the object of which is the benefit of the public generally, there is no antecedent unlikelihood that the Crown intends to be bound.[5]

792. (2) *Private and Local Acts.*—The extent to which the Crown is bound by a private Act was considered in *Magistrates of Edinburgh*

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[1] *Attorney-General* v. *De Keyser's Royal Hotel*, [1920] A.C. 508, per Lord Dunedin at p. 526.

[2] 1768, Mor. 10711 (interlocutor).

[3] Broom, Legal Maxims, 9th ed., p. 51; Maxwell on Statutes, 4th ed., pp. 202, 209; *Hornsey Urban Council* v. *Hennell*, [1902] 2 K.B. 73; *Cooper* v. *Hawkins* [1904], 2 K.B. 164; *Gorton Local Board* v. *Prison Commrs.* (noted *ibid.*); *Chare* v. *Hart*, 1918, 88 L.J. (K.B.), 833. For a statute expressly binding the Crown, see the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 30.

[4] *Advocate-General* v. *Mags. of Inverness*, 1856, 18 D. 366; *Somerville* v. *Lord Advocate*, 1893, 20 R. 1050, at p. 1065; *Mags. of Edinburgh* v. *Lord Advocate*, 1912 S.C. 1085; *vide* also *Lord Advocate* v. *Barbour and Lang*, 1866, 5 M. 84; *Borthwick* v. *Lord Advocate*, 1862, 1 M. 94.

[5] *Mags. of Edinburgh* v. *Lord Advocate, supra*, per Lord Pres. Dunedin at p. 1091.

v. *Lord Advocate*.[1] Provisions intended to apply to all the land in a city, part of which may be held by a government department, not *jure coronæ*, but on acquisition from a subject-proprietor, appear to bind the Crown, in respect of such lands, in the same manner as its subjects.[2]

793. (3) *Royal Proclamations*.—These have in no sense the force of law; they cannot impose any legal obligation not imposed by common law or statute.[3]

(ii) *The Crown in relation to Delict and Negligence.*

794. It has been questioned whether the English maxim, "the king can do no wrong," applies in Scotland to the effect of rendering the Crown not liable for delict or negligence.[4] The Court of Session, at all events, might suspend any privy writing of the king which was contrary to the administration of justice.[5] While in the earliest statements of the right to convene the Crown as defender,[6] there appears to be no limit set to the competency of such actions, the idea of delict committed by the Crown may scarcely have arisen.[7] The question only became of importance when vicarious liability for delicts committed by government servants required to be evaded by the Crown. In support of the contention that the maxim did not apply to Scotland, reference has been made to the case of *Bruce* v. *Lord Hamilton*,[8] in which the king intervened on behalf of one of the parties, in a manner which the Lord President characterised as contrary to law. Later,

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[1] 1912 S.C. 1085, per Lord Pres. Dunedin at p. 1090, and Lord Kinnear at p. 1092; *vide Lord Advocate* v. *Barbour and Lang*, 1866, 5 M. 84.

[2] *Ibid.*, at p. 1091.

[3] *Grieve* v. *Edinburgh and District Water Trust*, 1918 S.C. 700, at p. 713.

[4] *Macgregor* v. *Lord Advocate*, 1921 S.C. 847, at p. 850 (argument).

[5] Craig, iii. 7, 12; Balfour, Practicks, p. 267; *A.* v. *B.*, 1534, Mor. 7321.

[6] *Baron* v. *Earl of Morton*, 1533, Mor. 7319; *Earl of Morton* v. *Fleming*, 1569, Mor. 7325.

[7] But see Act of Sederunt, dated 15th January 1542–3 (Register of Acts and Decreets, i. 178; omitted from Islay Campbell's edition). By a "generale Act" the Lords ordain that if there are any who complain "upoun wrangis done to tham at the Kingis grace command quham God assolze be his officiaris or servandis in his name in the putting of tham furth of thar possessionis of thar heretage, takis, stedingis or rowmis without thar awin fre consent, and occupyit the samin to his utilite and proffitt mediatlie or immediatlie, for the wele of his grace saule thai salbe privilegit to call be bill or summondis the Kingis grace comptroller and advocat to here tham reponit to thar possessionis as thai had of before." See also *Supplication by Sir William Scott of Balwery* v. *The Comptroller and the Advocate* (Register of Acts and Decreets, i. 182; 22nd January 1542–3). Scott of Balwery stated that he and his predecessors held the lands of Kilgour and Estercas, in Fife, in heritage "quhill laitlie that our soverane lord . . . within the space of twa yeris or tharby last bipast at instigatioun and solisting of certane evill avisit personis his unfreyndis causit dyke in ane part . . ." (enclosing part of the lands) "to his gracis park of Falkland . . . without ony resignatioun or ony uthir titill of rycht." The Lords decern that Balwery should have regress, because they have seen the charter, and "knawis nocht be quhat ordour he wes put tharfra." These instances have been furnished through the kindness of Professor R. K. Hannay.

[8] 1598 (unreported), but see Fraser-Tytler's History of Scotland, ix. 289; Calderwood's History, v. 733; Anderson, Scottish Nation, i. 432; Reg. Privy Council, v. 1592–9, lxxxix. The case is referred to, and the speech of the Lord President quoted by the Earl of Birkenhead in a speech delivered in Edinburgh, reported, Scotsman, 31st May 1921. See also argument in *Macgregor* v. *Lord Advocate*, *supra*.

in *Hay* v. *Officers of State*,[1] an action for reparation was brought against the Crown, from the report of which it may be inferred that the maxim was not pled on the Crown's behalf. But the law as at present stated is that the Crown is not liable for the delict of its servants (nor, would it appear, for their negligence),[2] and no action for reparation will lie against the Crown.[3] The Crown is expressed as having the same immunity in Scotland as in England.[4] It has been assumed that, though no action lies against the Crown, an action may, as in England, lie against the individuals by whom the delict was committed.[5]

(iii) *The Crown and Contract.*

795. While the Crown may be sued generally in contract, the English rule that the Crown is not liable *ex contractu* to its own servants but only to independent contractors has been adopted in Scotland.[6] Crown servants incur no personal liability *ex contractu*, unless they expressly undertake it, even although no action may lie against their principal.[7]

(iv) *Special Pleas and Exceptions: Prescription.*

796. The Crown is not to be prejudiced by the negligence of its servants in the conduct of litigation to which it is a party.[8] The Crown may thus state any exception, reply, or defence formerly omitted *per incuriam* of its servants, and that by way of exception or reply without raising an action of reduction.[9] The Crown may not, however, plead its servants' negligence as a ground for reducing a right founded on prescription;[10] the positive prescription runs against the Crown;[11] and, it would appear also, the negative.[12] But its officers cannot

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[1] 1832, 11 S. 196.

[2] *Lord Advocate* v. *Duke of Hamilton*, 1891, 29 S.L.R. 213; see *infra*, para. 796, for other authorities.

[3] *Wilson* v. *1st Edinburgh City R.G.A. Volunteers*, 1904, 7 F. 168; *Smith* v. *Lord Advocate*, 1897, 25 R. 112; *Macgregor* v. *Lord Advocate*, 1921 S.C. 847; Glegg, Reparation, 2d ed., p. 92.

[4] *Wilson* v. *1st Edinburgh City R.G.A. Volunteers*, *supra*, per Lord Kyllachy at p. 170; *Macgregor* v. *Lord Advocate*, *supra*, per Lord Justice-Clerk at p. 852, and per Lord Salvesen at p. 853. Of the English authorities, see especially *Viscount Canterbury* v. *Attorney-General*, 1842, 1 Phillips 306; *Bainbridge* v. *Postmaster-General*, [1906] 1 K.B. 178 (C.A.).

[5] *Wilson* v. *1st Edinburgh City R.G.A. Volunteers*, *supra*; *Macgregor* v. *Lord Advocate*, *supra*.

[6] *Smith* v. *Lord Advocate*, *supra*; *Mackie* v. *Lord Advocate*, 1898, 25 R. 769; *Mulvenna* v. *The Admiralty*, 1926 S.C. 842, per Lord Blackburn.

[7] Gloag on Contract, p. 177.

[8] 1600, c. 14; Mackenzie, Observations, p. 311; Stair, iv. 35, 1; Ersk. i. 2, 27; cases in Morison, 7865–70.

[9] 1600, c. 14; *Crawford* v. *Kennedy*, 1694, Mor. 7866.

[10] Stair, ii. 12, 25; Ersk. iii. 7, 31; *Earl of Leven* v. *Balfour*, 1711, Mor. 10930.

[11] 1617, c. 12; Ersk. iii. 7, 31; *H.M. Advocate* v. *Graham*, 1844, 7 D. 183.

[12] *Earl of Fife's Trs.* v. *Commrs. of Woods and Forests*, 1849, 11 D. 889; *Deans of Chapel Royal* v. *Johnstone*, 1867, 5 M. 414; 1869, 7 M. (H.L.) 19; *vide H.M. Advocate* v. *Mags. of Stirling*, 1846, 8 D. 450; Juridical Review, xxxv., at pp. 56–70, discusses the law.

prorogue the jurisdiction of an inferior Court to the prejudice of the Crown;[1] nor will an action of warrandice lie against the Crown, although there has been an express grant of warrandice on the Crown's behalf; because the Crown ought not to suffer by its servants' negligence.[2] Nor is the Crown exposed to a plea of bar founded on error of its officers.[3]

(v) *Crown Debts.*

797. The preference accorded to Crown debts in Scotland in competition with subject creditors is limited in character, and falls naturally into two categories: (*a*) the procedure by which diligence for Crown debts is obtained and enforced, and (*b*) the extent to which Crown debts receive preferential ranking.

798. (*a*) *Diligence.*—The procedure by which diligence for Crown debts is obtained and enforced differs from that for debts due to subject-creditors.[4] Jurisdiction in Crown debts was vested in the Court of Exchequer set up in 1708,[5] the powers of which are now vested in the Court of Session, and are exercised in the Outer House by the Lord Ordinary in Exchequer causes.[6] To this Court were given the same powers as exercised by the existing Court of Exchequer in England.[7] Diligence for Crown debts formerly proceeded on a writ of extent.[8] But this procedure was impliedly abolished by the Court of Exchequer (Scotland) Act, 1856,[6] which substituted for it a new form of Crown diligence based on the common law of Scotland.[8] By this, the existing procedure, decrees in Exchequer causes may be extracted at once, without awaiting the usual reading in the minute book, and the preparation of extract decrees in Exchequer causes has priority over all other business in the office of the Extractor of the Court of Session.[9] The duty of putting such extracts into execution is entrusted to the sheriffs,[10] who, by virtue of them, may use arrestments in ordinary form, which operate to transfer to the Crown, preferably to all other creditors of the Crown debtor, a right to and interest in the arrested fund, sufficient to satisfy the Crown debts, with interest and expenses.[11] To that extent, the arrested fund may be paid to the sheriff without awaiting a furthcoming.[11] Failing payment, the Crown may raise a furthcoming, and also use diligence against the estate of any person indebted to the Crown debtor.[11] The sheriff may charge the Crown debtor on the extract,[12] and on the expiry of the charge poind his whole moveable effects.[13] In the last resort the sheriff may grant warrant to imprison

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[1] *Eyres* v. *Hunter*, 1711, Mor. 7596.
[2] Ersk. ii. 3, 27.
[3] *Lord Advocate* v. *Miller's Trs.*, 1884, 11 R. 1046; *Lord Advocate* v. *Meiklam*, 1860, 22 D. 1427; *Lord Advocate* v. *Duke of Hamilton*, 1891, 29 S.L.R. 213; *Alston's Trs.* v. *Lord Advocate*, 1896, 33 S.L.R. 278.
[4] Graham Stewart on Diligence, p. 454 *et seq.*; Bell's Prin., ss. 2291–7.
[5] 6 Anne, c. 26, s. 1.
[6] 19 & 20 Vict. c. 56.
[7] 6 Anne, c. 26.
[8] Bell's Com. ii. 40.
[9] 19 & 20 Vict. c. 56, s. 28
[10] *Ibid.*, s. 29.
[11] *Ibid.*, s. 30.
[12] *Ibid.*, s. 31.
[13] *Ibid.*, s. 32.

the debtor.[1] Nothing in the Act is to impair any preference of the Crown in competition with other creditors; and in all questions of competition, the execution of any charge on the Crown's behalf is to be taken as in all respects equivalent to the teste (*i.e.* warrant) of a writ of extent, under the law existing before the Act.[2] See EXCHEQUER.

799. (*b*) *Ranking.*—By the common law of Scotland, the Crown was not entitled to preferential ranking for its debts in competition with a subject creditor.[3] But in 1707, in pursuance of Article XIX. of the Treaty of Union,[4] the whole revenue laws of England were extended to Scotland by the same Act as instituted the new Court of Exchequer,[5] including the provision of the statute 33 Hen. VIII. c. 39,[6] that processes for the recovery of Crown debts were to be preferred to those for the recovery of debts due to subject creditors, wherever the subject creditors had not already obtained final judgment in their favour. The extent to which the English law of preferential ranking of Crown debts has been imported into Scots law is fully considered in *The Admiralty* v. *Blair's Tr.*[7] In that case the Crown had used no diligence against its debtor's estate, before it was transferred to the trustee in his sequestration. The Crown did not come within the statute 33 Hen. VIII. c. 39, for it had instituted no process against the debtor. But it claimed preferential ranking, on the general principle of English law that whenever the rights of the Crown and of a subject-creditor conflict, the Crown's right prevails.[8] It was held that in Scotland the Crown has no preference independently of the statute of Hen. VIII.;[9] and that, accordingly, to obtain preferential ranking, the Crown must (1) use diligence or institute a process for recovery of its debt; (2) do so before the debtor has been divested of his estate. This preferential ranking which the Crown may obtain does not extend over heritage in Scotland,[10] where the same rules as to obtaining preference apply between the Crown and a subject as between subject and subject.[11]

800. Crown debts are generally exempt from the provisions of the Bankruptcy Acts.[12] Thus the retroactive effect of sequestration as a diligence does not apply to Crown debts, and the Crown may, at any time before the bankrupt's divestiture of his estate, obtain by diligence a preference over the other creditors, and over the trustee.[13] But this preference can no longer be obtained after the debtor's property has been transferred to a subject or vested in the trustee in bankruptcy.[14] The Crown is, however, not excluded from going against a bankrupt after

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[1] 19 & 20 Vict. c. 56, s. 34.
[2] *Ibid.*, s. 42.
[3] *The Admiralty* v. *Blair's Tr.*, 1916 S.C. 247, sums up the authorities.
[4] 5 Anne, c. 8, Art. XIX.
[5] 6 Anne, c. 26.
[6] 33 Hen. VIII. c. 39, s. 74.
[7] 1916 S.C. 247.
[8] *In re Henley & Co.*, 1878, 9 Ch. D. 469; *New South Wales Taxation Commrs.* v. *Palmer*, [1907] A.C. 179.
[9] 1916 S.C., per Lord Mackenzie at p. 255.
[10] 6 Anne, c. 26, s. 8.
[11] Ersk. i. 3, 31; *Burnet's Creditors* v. *Murray*, 1754, Mor. 7873; aff. 1 Pat. 594.
[12] Goudy on Bankruptcy, 4th ed., pp. 245, 538.
[13] Goudy, p. 538.
[14] *Advocate-General* v. *Magistrates of Inverness*, 1856, 18 D. 366, per Lord Mackenzie at p. 373; *The Admiralty* v. *Blair's Tr.*, 1916 S.C. 247.

his discharge; for a discharge under the Bankruptcy Acts does not relieve the bankrupt, *inter alia*, of debts due to the Crown, or of penalties with which he stands charged at the suit of the Crown, unless the Treasury has consented to his discharge.[1] Besides the general preference which the Crown may obtain by using diligence, the Crown has a statutory preference in the bankruptcy of its debtors for all imperial taxes, to the extent of twelve months arrears, and affecting the debtor's whole moveable estate.[2] By this statutory preference, the Crown is entitled to be ranked before all ordinary creditors, and immediately after the debtor's deathbed and funeral expenses and the wages of his servants. If the Crown has used diligence, then it is preferred to all creditors.

801. In competition with a landlord's hypothec for rent the Crown's diligence prevails, if the execution of the charge takes place before sale under a sequestration for rent.[3] But this does not apply to arrears of taxes.[4] On the other hand, a lien or right of pledge existing at the date of the Crown's diligence is not affected thereby;[5] and it has been thought that compensation is pleadable against the Crown.[6] In competition with an arrestment or poinding by a subject-creditor the Crown will be preferred, if its diligence is used before the decree of furthcoming or sale under the poinding.[7] No charge is necessary on the part of the Crown in poinding the effects of a deceased debtor.[8]

Subsection (5).—*Diligence against the Crown.*

(i) *Execution of Decrees.*

802. While the matter appears not to be expressly decided, and it has been argued that diligence may not be used generally against the Crown,[9] it seems arguable from the fact of the Court in Scotland having decerned against the Crown as unsuccessful defender in petitory actions[10] that diligence may be employed against the Crown. Diligence may, at any rate, be used against the Crown to recover expenses granted by the Court.[11] On grounds of public policy, salaries and wages of Crown servants are not arrestable in the hands of the Crown.[12]

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[1] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), s. 147; Goudy, 4th ed., p. 390; Wallace on Bankruptcy, 2nd ed., p. 198.

[2] Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 88; Goudy, p. 514; Wallace, p. 299.

[3] Goudy, p. 538; Bell's Prin., s. 1241; Bell's Com. ii. 52; *Robertson* v. *Jardine*, 1802, Mor. 7891; Rankine, Leases, p. 387.

[4] Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 88.

[5] *The King* v. *British Linen Co.*, 1826; Bell's Com. ii. 54 n.

[6] Bell's Com. ii. 55.

[7] 19 & 20 Vict. c. 56, s. 30; Bell's Com. ii. 51.

[8] *Ibid.*, s. 36.

[9] *Mulvenna* v. *The Admiralty*, 1926 S.C. 842; *vide* argument, p. 853.

[10] *Duke of Athole* v. *Postmaster-General*, 1870, 3 S.L.R. 66; see *Reid* v. *Officers of State*, 1747, Mor. 1355; and interlocutor in *Duke of Buccleuch* v. *Officers of State*, 1768, Mor. 10711.

[11] *Lord Advocate* v. *Mathison*, 1866, 1 S.L.R. 174.

[12] *Mulvenna* v. *Admiralty*, 1926 S.C. 842.

(ii) *Recovery of Documents.*

803. The Court has power, in the exercise of its discretion, to order production of documents in the custody of a public department, and that even when the public department pleads public interest as an objection to their production.[1] The Crown in Scotland is thus in the same position as a subject with regard to diligence for the recovery of documents; with this distinction, that as public policy is always a ground for the Court refusing to order production of documents, that ground is available to the Crown more readily than to a private citizen. In a litigation between subjects, where no objection to production on grounds of public policy is taken by the Crown, it cannot be taken by the opposing party.[2] See COMMISSION AND DILIGENCE.

SUBSECTION (6).—*Expenses against the Crown.*

804. There is now no distinction between the Lord Advocate, acting for the Crown, and a private citizen in the matter of expenses.[3] The Crown is subject to the same rules as a subject litigant with regard to the taxation of an account of judicial expenses.[4]

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[1] *Henderson* v. *M'Gown*, 1916 S.C. 821; explaining *The Admiralty* v. *Aberdeen Steam Trawling and Fishing Co.*, 1909 S.C. 335.

[2] *Henderson* v. *Robertson*, 1853, 15 D. 292; *Mills* v. *Kelvin and James White, Ltd.*, 1912 S.C. 995.

[3] 19 & 20 Vict. c. 56, s. 24; Maclaren, Court of Session Practice, p. 198; *Edinburgh Life Assurance Co.* v. *Lord Advocate*, [1910] A.C. 143; 1910 S.C. (H.L.) 13; *Macleod's Judicial Factor* v. *Busfield*, 1914, 2 S.L.T. 268; *vide Lord Advocate* v. *Mathison*, 1866, 1 S.L.R. 174; *Lord Advocate* v. *Stewart*, 1899, 36 S.L.R. 945.

[4] Maclaren, Expenses, p. 429; *Officers of Ordnance* v. *Mags. of Edinburgh*, 1860, 22 D. 446; 32 Jur. 164; *Lord Advocate* v. *Stewart* (*supra*).

CROWN AGENT.

See CRIME (CRIMINAL ADMINISTRATION).

CROWN CHARTER.

See CHARTER (FEUDAL); COMPLETION OF TITLE.

CROWN DEBTS.

See CROWN, THE; EXCHEQUER.

CROWN LANDS.

See CROWN, THE.

CROWN OFFICE.

See CRIME (CRIMINAL ADMINISTRATION).

CROWN, PLEAS OF THE.

See CRIME.

CRUELTY (CONJUGAL).

See JUDICIAL SEPARATION.

CRUELTY TO ANIMALS.

See ANIMALS.

CRUELTY TO CHILDREN.

See CHILDREN AND YOUNG PERSONS.

CRUIVES AND ZAIRES.

See FISHINGS.

CULPA.

See DAMAGES; NEGLIGENCE.

CULPA TENET SUOS AUCTORES.

See MAXIMS; NEGLIGENCE.

CULPABLE HOMICIDE.

See CRIME.

CUM DECIMIS INCLUSIS.

See TEINDS.

CURATOR.
CURATOR BONIS.

See JUDICIAL FACTOR; TUTORS AND CURATORS.

CURRENTE TERMINO.

See HYPOTHEC; LEASE.

CURSING AND SWEARING.

See CRIME.

CURTILAGE.

See INHABITED HOUSE DUTY.

CUSTODY OF CHILDREN.

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Section 1.—At Common Law.

Subsection (1).—*Right of Father.*

805. At common law a father in virtue of the *patria potestas* has a legal right to the custody of his legitimate children during pupillarity.[1] Under this power he may remove them from place to place and select a residence for them either with himself or in a separate establishment. Even though resident abroad, he is not deprived of his right to regulate the residence and education of his pupil children in this country.[2] So strong, indeed, is the father's right that he has been awarded the custody even when a child was in infancy.[3]

806. But this right to custody is not absolute. At common law, it is subject to the control of the Court of Session acting in virtue of its *nobile officium*, and it has been further restricted by various statutes.[4] The paramount consideration always is the physical and moral welfare of the child, and this criterion is invariably applied by the Court when the question of custody is raised in legal proceedings whether as between the parents of the child or with third parties. *Prima facie*, however, at common law, the father is entitled to custody, and his right will not be displaced unless the Court is satisfied that he has been guilty of misconduct, and that it is not in the interests of the child that custody should be given to him.[5]

807. In determining the right to custody as between the parents of a child, it is relevant to consider the conduct of the husband towards

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[1] *Leys* v. *Leys*, 1886, 13 R. 1223.

[2] *Pagan* v. *Pagan*, 1883, 10 R. 1072.

[3] *Bloe* v. *Bloe*, 1882, 9 R. 894; *Rintoul* v. *Rintoul*, 1898, 1 F. 22.

[4] See para. 809 *et seq.*, *infra*.

[5] *Pagan* v. *Pagan*, *supra*; *A. C.* v. *B. C.*, 1902, 5 F. 108; *M'Kellar* v. *M'Kellar*, 1898, 25 R. 883.

his wife.[1] A husband who refused to live with his wife, but against whose moral character there was no allegation, was held entitled to the custody of his children on the ground that he had not by his conduct abdicated his position as head of the family.[2] In dealing with the case of a *minor pubes*, the Court will give great weight to his or her wishes.[3]

Subsection (2).—*Right of Mother.*

808. On the death or incapacity of the father, the mother, at common law, has the right to the custody of the children of the marriage during pupillarity.[4] This right, however, as in the case of the father, is not absolute and will be controlled in the interest of the child. If the mother is thought to be an unfit custodier on the ground of her improper conduct or otherwise, she may be deprived of the custody, and the child may be handed over to the tutor nominate or at law, or dative, provided he is not the next heir, in which case the custody may be given to the nearest cognate of the pupil,[5] or to the factor *loco tutoris*,[6] or to some other unexceptionable third party, the welfare of the child being always the paramount consideration. On the death or incapacity of the mother, the custody of the child is disposed of in a similar manner.

Section 2.—Under Statute.

809. As above stated, the common law right of a father to the custody of his legitimate children has been modified by various statutory enactments. These statutes are briefly dealt with below in their chronological order :—

Subsection (1).—*Conjugal Rights (Scotland) Amendment Act*, 1861.

810. By s. 9 of this Act,[7] it is provided that in any action for judicial separation or for divorce, the Court may from time to time make interim orders and in the final decree make such provision as shall seem just and proper with respect to the custody, maintenance, and education of any pupil child of the marriage to which such action relates. This statute has given the Court a very wide discretion. It is the duty of the Court to consider the whole circumstances of the particular case before it—the misconduct which was the cause of the action, the general character of the parents and, above all, the interest of the children, and to weigh the comparative advantages or disadvantages of leaving the custody of all or of any of them to the one parent or to the other.[8] It has been held

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[1] *Stevenson* v. *Stevenson*, 1894, 21 R. (H.L.) 96.
[2] *Sleigh* v. *Sleigh*, 1893, 30 S.L.R. 272.
[3] *Flannigan* v. *Inspector of Bothwell*, 1892, 19 R. 909.
[4] *Johnston* v. *Otto*, 1849, 11 D. 718 ; *A. B.* v. *C. D.*, 1850, 12 D. 1297.
[5] Stair, i. 6, 15 ; Ersk. i. 7, 7 ; *Higgins* v. *Boyd*, 1821, 1 S. 50 ; *Gibson* v. *Dunnett*, 1824, 3 S. 249.
[6] *Denny* v. *M'Nish*, 1863, 1 M. 268 ; *Gulland* v. *Henderson*, 1878, 5 R. 768 ; *Moncreiff*, 1891, 18 R. 1029.
[7] 24 & 25 Vict. c. 86.
[8] *Symington* v. *Symington*, 1875, 2 R. (H.L.) 41, per Cairns L.C.

that the considerations set forth in s. 5 of the Guardianship of Infants Act, 1886,[1] may be taken into account by the Lord Ordinary in actions of judicial separation or divorce.[2]

811. If, in a final decree of separation or divorce, provision has been made with respect to the custody of a child, it is incompetent for either party to apply in the action for an alteration of such provision, unless right to apply has been reserved in the decree.[3] But it is competent for a parent, who has been deprived of the custody of his or her child in such an action, to present a petition under s. 5 of the Guardianship of Infants Act, 1886.[4] It is incompetent for a Lord Ordinary to pronounce an order for custody after decree of divorce or separation has been pronounced.[5] An order by the Lord Ordinary under the Act ceases to be operative with regard to each child when it emerges from pupillarity.[6] The Act, while empowering the Lord Ordinary to make interim orders, does not deprive the Inner House of its jurisdiction to pronounce such orders, but this jurisdiction will be exercised only in exceptional cases.[7]

Subsection (2).—*The Criminal Law Amendment Act*, 1885.

812. By s. 12 of this Act [8] where, on the trial of any offence under the Act, it is proved that the father, mother, or other guardian has caused or encouraged the seduction or prostitution of a girl under sixteen years of age, the Court is empowered to deprive them of all authority over the girl and to appoint as guardian any person willing to take charge of her.

Subsection (3).—*Guardianship of Infants Acts*, 1886 *and* 1925.

813. Under the Guardianship of Infants Act, 1925,[9] which amended the Act of 1886,[10] it is provided that where in any proceeding before any Court the custody or upbringing of a pupil is in question, the Court in deciding that question shall regard the welfare of the pupil as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father in respect of such custody or upbringing, is superior to that of the mother, or the claim of the mother is superior to that of the father (s. 1). This section has been judicially considered and applied in the undernoted cases.[11] It is further provided that the mother of a pupil shall have the same powers as the father to apply to the Court in respect of any matter affecting the pupil (s. 2). Under the Act of 1886, the Court is empowered, upon the application of the mother of a pupil, to make an order regarding its custody and

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[1] 49 & 50 Vict. c. 27. [2] *Stevenson* v. *Stevenson*, 1894, 21 R. (H.L.) 96.
[3] *Sanderson* v. *Sanderson*, 1921 S.C. 686.
[4] *Beedie* v. *Beedie*, 1889, 16 R. 648. [5] *Lang* v. *Lang*, 1869, 7 M. 445.
[6] *Watson* v. *Watson*, 1895, 23 R. 219. [7] *M'Callum* v. *M'Callum*, 1893, 20 R. 293.
[8] 48 & 49 Vict. c. 69. [9] 15 & 16 Geo. V. c. 45.
[10] 49 & 50 Vict. c. 27. [11] *M.* v. *M.*, 1926 S.C. 778; *Hume* v. *Hume*, 1926 S.C. 1008.

the right of access thereto of either parent. In determining these rights the Court is directed to have regard to the welfare of the child, and to the conduct and wishes of both parents (s. 5). Under the Act of 1925 such an order may be made, but not enforced, although the mother is then residing with the father of the pupil, and the Court may further order the father to pay to the mother a periodical sum for the maintenance of the child (s. 3).

814. On the death of either parent the survivor becomes the guardian of the child either alone or jointly with any guardian appointed by the predeceaser. If no guardian has been so appointed, or if the guardian is dead or refuses to act, the Court may appoint a guardian to act jointly with the surviving parent (s. 4). If the surviving parent objects to any guardian appointed by the predeceasing parent acting as guardian, or if such guardian considers that the surviving parent is unfit to have the custody of the child, the guardian may apply to the Court, and the Court may either refuse to make an order (in which case the surviving parent shall be sole guardian), or make an order that the guardian shall act jointly with the surviving parent or that he shall be sole guardian. In the latter case, the Court may give right of access to the parent, and order him or her to pay to the guardian a periodical sum for the maintenance of the child (s. 5). If guardians are appointed by both parents, they act jointly after the death of the surviving parent. A guardian appointed by the Court to act jointly with the surviving parent continues to act as guardian after the death of the latter, but if the surviving parent has appointed a guardian, the guardian appointed by the Court acts jointly with him (s. 5).

815. By s. 7 of the Act of 1886 the Court, in pronouncing decree of divorce on judicial separation, may declare the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children of the marriage. A person so declared unfit is not entitled on the death of the other parent to the custody of the children. As above stated, the Act of 1886 was amended by the Act of 1925. It has been held that the former Act did not affect the paramount right of the father at common law to the custody of his children, but merely allowed the Court to deprive him of the right, or to modify it in certain circumstances, if the interests of the children so demanded.[1] While the fact that a mother has entered into a second marriage disqualifies her at common law from acting as guardian, it does not affect her rights under the Guardianship of Infants Acts to be guardian to her children by her first marriage.[2] The father as well as the mother may petition under s. 5 of the Act of 1886.[3] The Act does not apply to bastards, and a mother cannot under its provisions appoint a guardian to her illegitimate child.[4]

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[1] *M'Kellar* v. *M'Kellar*, 1898, 25 R. 883; *Sleigh* v. *Sleigh*, 1893, 30 S.L.R. 272; *Campbell* v. *Campbell*, 1920 S.C. 31.

[2] *Campbell* v. *Maquay*, 1888, 15 R. 784.

[3] *Beedie* v. *Beedie*, 1889, 16 R. 648.

[4] *Brand* v. *Shaws*, 1888, 16 R. 315.

SUBSECTION (4).—*The Custody of Children Act*, 1891.

816. By this statute [1] it is provided that where a parent of a child (which includes any person legally liable to maintain it or entitled to its custody) applies to the Court of Session for an order for production of the child, the Court may refuse to make such order if it is of opinion that the applicant has abandoned or deserted the child, or has been guilty of other conduct rendering him unsuitable to be custodier (s. 1). It is also provided that if the child is being brought up by another person (including a school or institution) or is boarded out by a parochial board the Court may, if it makes an order for delivery to the applicant, further order that the applicant shall pay to such person or board the costs incurred in bringing up the child (s. 2).

817. The Act further provides that if a parent has abandoned or deserted his child, or allowed it to be brought up by another person under such circumstances as to satisfy the Court that the parent was unmindful of parental duties, the Court shall not make an order for delivery to the parent unless satisfied, having regard to the welfare of the child, that he is a fit person to have custody (s. 3). The meaning of the word "abandoned" in ss. 1 and 3 has been judicially considered.[2] If an action for custody is raised in the Sheriff Court, and if questions are raised involving the application of this Act, the action ought to be remitted to the Court of Session.[3]

SUBSECTION (5).—*The Children Act*, 1908.

818. This Act [4] provides that where any person having the custody, charge, or care of a child has been convicted of committing in respect of such child certain specified offences, or has been committed for trial for any such offence, or is bound over to keep the peace towards such child (and the parent has been proved to be party or privy to the offence or cannot be found), the Court may commit the custody of the child until it reaches the age of sixteen years to a relative or other fit person willing to undertake the charge (s. 21). The person appointed as custodier ought, if possible, to be of the same religious persuasion as that to which the child belongs (s. 23). The Secretary for Scotland may at his discretion discharge the child from such custody (s. 21).

SECTION 3.—RELIGION.

819. At common law, the father has the right to decide as to the religion in which his child is to be brought up. Religion is often of importance in questions of custody after the death of the father where the child is residing with strangers, or is maintained in an institution. The paramount consideration as in the case of custody is the welfare of

[1] 54 & 55 Vict. c. 3.
[2] *M'Lean* v. *Hardie*, 1927 S.C. 344.
[3] *Murray* v. *Forsyth*, 1917 S.C. 721.
[4] 8 Edw. VII. c. 67.

the child, but the father's wishes and directions are of the greatest weight, and will be given effect to, provided they are not detrimental to the general interests of the child.[1] In view of the provisions of the Guardianship of Infants Acts, 1886 and 1925,[2] it would appear that the mother's wishes ought not now to be totally disregarded.[3]

820. By s. 4 of the Custody of Children Act, 1891,[4] the Court, if an application by a parent for the custody of a child is refused, may make an order to secure that it is brought up in the religion in which the parent has a legal right to require that it should be brought up, and in making such order may consult the wishes of the child. Under s. 23 of the Children Act, 1908,[5] the Court, in committing a child to the charge of a third party under the provisions of the Act, is directed to ascertain the child's religious persuasion and, if possible, to select as custodier a person of the same religion.

Section 4.—Access.

821. A parent who is deprived of custody is, unless in exceptional circumstances, entitled to reasonable access to the child.[6] It is usual for the Court, if asked, to make an order for access in the final decree in actions of judicial separation and divorce, but in many cases the matter is arranged by the parties.[7] In the interests of the child, which are the main consideration, access has been refused in exceptional cases, *e.g.* where a wife unjustifiably left her husband and was living apart from him,[8] and where she was leading an immoral life.[9] The Court will not readily interfere with the discretion of a husband, who has divorced his wife for adultery, in the matter of allowing the mother access to the children.[10]

Section 5.—Procedure.

Subsection (1).—*Petition to Inner House.*

822. Applications for permanent custody of and access to children should be made in the Court of Session by petition to the Inner House under the *nobile officium*,[11] or in vacation to the Lord Ordinary on the Bills.[12] Under the Guardianship of Infants Act, 1886, such applications may be presented to either Division of the Court (or in vacation to the Lord Ordinary on the Bills) or to the Sheriff Court within whose juris-

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[1] *Morrison* v. *Quarrier*, 1894, 21 R. 1071; *Reilly* v. *Quarrier*, 1895, 22 R. 879; *Alexander* v. *M'Garrity*, 1903, 5 F. 654; *O'Donnell* v. *O'Donnell*, 1919 S.C. 14.

[2] 49 & 50 Vict. c. 27; 15 & 16 Geo. V. c. 45.

[3] *Morrison* v. *Quarrier*, *supra*, per Lord M'Laren; *Kincaid* v. *Quarrier*, 1896, 23 R. 676; *Murray* v. *Maclay*, 1903, 6 F. 160.

[4] 54 & 55 Vict. c. 3.

[5] 8 Edw. VII. c. 67.

[6] *M'Iver* v. *M'Iver*, 1859, 21 D. 1103.

[7] *Symington* v. *Symington*, 1875, 2 R. (H.L.) 41.

[8] *Mackenzie* v. *Mackenzie*, 1881, 8 R. 574.

[9] *Shirer* v. *Dixon*, 1885, 12 R. 1013.

[10] *Bowman* v. *Graham*, 1883, 10 R. 1234; *C. D.* v. *A. B.*, 1908 S.C. 737.

[11] *Leys* v. *Leys*, 1886, 13 R. 1223; *A. B.* v. *C. B.*, 1906, 8 F. 973, per Lord M'Laren.

[12] *Edgar* v. *Fisher's Trs.*, 1893, 21 R. 59.

diction the respondent or respondents or any of them reside, subject to the right of removal to the Court of Session.[1] The Custody of Children Act, 1891,[2] appears to apply only to petitions presented in the Court of Session.[3]

SUBSECTION (2).—*In Action of Divorce or Judicial Separation.*

823. Under the Conjugal Rights (Scotland) Amendment Act, 1861,[4] a Lord Ordinary before whom an action of divorce or judicial separation depends may incidentally deal with questions of custody and access in such action, even although there is no conclusion to that effect in the summons.[5] But any order dealing with custody or access is incompetent after decree of divorce or separation has been pronounced.[6] The procedure, thereafter, must be by petition to the Inner House. Even while an action of divorce is pending, a petition for custody or access is competent, but the Court will exercise this jurisdiction only in exceptional circumstances.[7]

SUBSECTION (3).—*Enforcement of Order of Court.*

824. When an order for custody has been granted and there is wilful failure to implement, the usual procedure is to ordain the defaulting party to appear at the Bar of the Court, and on failure to appear, or to agree to deliver up the children, to sequestrate his estate,[8] or imprison him for contempt of Court.[9]

SUBSECTION (4).—*Jurisdiction of Sheriff.*

825. At common law, the Sheriff had power in cases of emergency to regulate the *interim* custody of children, and also to give effect to and enforce the *prima facie* legal title of a father to have the custody of his legitimate child, and of a mother to have the custody of her illegitimate child. He had no power at common law to deal with the question of permanent custody,[10] or if the question between the parties involved an appeal to the *nobile officium* of the Court for the purpose of overriding the parents legal title, or to a statute which applied only to procedure in the Court of Session.

826. Under the Guardianship of Infants Act, 1886,[11] the Sheriff within whose jurisdiction the respondent resides is empowered to make orders regulating custody and access subject to the right of any party to the

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[1] 49 & 50 Vict. c. 27, ss. 9 and 10. [2] 54 & 55 Vict. c. 3.
[3] *Mackenzie* v. *Keillor*, 1892, 19 R. 963; *Murray* v. *Forsyth*, 1917 S.C. 721, per Lord Skerrington.
[4] 24 & 25 Vict. c. 86, s. 9.
[5] *Symington* v. *Symington*, 1874, 1 R. 871.
[6] *Lang* v. *Lang*, 1869, 7 M. 445. [7] *M'Callum* v. *M'Callum*, 1893, 20 R. 293.
[8] *Ross* v. *Ross*, 1885, 12 R. 1351; *Edgar* v. *Fisher's Trs.*, 1893, 21 R. 59.
[9] *Leys* v. *Leys*, *supra*.
[10] *Hood* v. *Hood*, 1871, 9 M. 449; *Mackenzie* v. *Keillor*, *supra*; *Gillan* v. *Barony Parish Council of Glasgow*, 1898, 1 F. 183. [11] 49 & 50 Vict. c. 27, ss. 9 and 10.

cause to have it removed to the Court of Session. By the Sheriff Courts (Scotland) Act, 1907,[1] as amended by the Sheriff Courts (Scotland) Act, 1913,[2] the jurisdiction of the Sheriff is extended to include actions for regulating the custody of children. Such actions may at any stage be remitted by the Sheriff to the Court of Session either on cause shewn or *ex proprio motu*.[3] Under the last-mentioned statutes, it is now competent for a Sheriff to deal with an action for recovery of the custody of a child at the instance of its father against a third party, but the Sheriff may remit such an action to the Court of Session if he considers it more appropriate for that Court. It is the duty of the Sheriff so to remit, if the action discloses that questions involving the application of Custody of Children Act, 1891, are raised.[4]

Section 6.—Illegitimate Children.

Subsection (1).—*At Common Law.*

827. The mother of an illegitimate child is the only person who has a legal title to its custody. The father, although liable to a certain extent and under certain conditions to aliment it, is not entitled to the custody of his illegitimate child. This obligation to aliment which arises *ex jure naturali* subsists until the child can support itself. But after the child has attained a certain age—generally seven years in the case of a boy and ten years in the case of a girl—the obligation may be discharged by the father taking the child himself or by making some other arrangement for its maintenance and education.[5] A child, however, will not be removed from its mother's custody if it appears that such removal would be detrimental to its welfare.[6] If the mother makes no claim against the father for the maintenance of the child, the father cannot demand delivery.

828. But, while the mother alone has the legal right of custody, if the question of custody, either as between the parties themselves or with third parties, is raised in legal proceedings, the Court in determining to whom it shall be given will take into consideration the welfare and interests of the child—particularly in regard to its health, future prospects, and moral education.[7] Effect will, if possible, be given to the desire of the mother as to its religious upbringing.[8]

829. The title of the mother of an illegitimate child to sue for its delivery is personal and intransmissible.[9] She cannot by agreement even with the father of the child deprive herself of the right to its custody,[10]

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[1] 7 Edw. VII. c. 51, s. 5 (2).
[2] 2 & 3 Geo. V. c. 28, First Schedule.
[3] 7 Edw. VII. c. 51, s. 5.
[4] *Murray* v. *Forsyth*, 1917 S.C. 721.
[5] *Corrie* v. *Adair*, 1860, 22 D. 897; *Grant* v. *Yuill*, 1872, 10 M. 511.; *Moncrieff* v. *Langlands*, 1900, 2 F. 1111.
[6] *Brown* v. *Halbert*, 1896, 23 R. 733.
[7] *Sutherland* v. *Taylor*, 1887, 15 R. 224; *Campbell* v. *Croall*, 1895, 22 R. 869; *Mitchell* v. *Wright*, 1905, 7 F. 568; *Walter* v. *Culbertson*, 1921 S.C. 490.
[8] *Brand* v. *Shaws*, 1888, 16 R. 315.
[9] *Brand* v. *Shaws*, 1888, 15 R. 449.
[10] *Macpherson* v. *Leishman*, 1887, 14 R. 780; *Kerrigan* v. *Hall*, 1901, 4 F. 10.

and a person with whom an illegitimate child has been boarded is not entitled to retain the custody of the child until arrears of aliment due by its mother have been paid.[1]

SUBSECTION (2).—*Under Statute.*

830. The Guardianship of Infants Acts, 1886 to 1925, do not apply to illegitimate children, and accordingly a mother cannot nominate a guardian to her bastard child under their provisions.[2] The provisions of the Custody of Children Act, 1891, which are applicable to illegitimate as well as legitimate children, have already been considered.[3]

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[1] *Kerrigan* v. *Hall*, 1901, 5 F. 10.
[2] *Brand* v. *Shaws*, 1888, 16 R. 315.
[3] *Supra*, para. 816.

CUSTOM AND USAGE.

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Section 1.—As Source of Law.

831. In all legal systems a great part of what is known as the common law consists of usages and customs, which, themselves of more or less gradual growth, have become definite and ascertained in character, and have ultimately been incorporated with the law by means of legislative or judicial recognition. Usage or custom has been said to be "the great source of law." There is a sense in which this is true; another, in which it is not. The distinction is of importance if an accurate view is to be obtained of the true limits within which custom or usage may in a systematic body of law legitimately operate.[1]

832. The expression "source of law" properly denotes the authority which confers upon certain formulated rules the force and sanction of law; in this sense the brocard is untrue. The sole source of law, in the sense of that which impresses upon such rules a legal character, is their recognition by the State. This may be given either expressly, through the Legislature or the Courts, or tacitly, by allowance, followed, in the last resort, by enforcement.[2] The expression "source of law" may, on the other hand, be used merely as descriptive of the cause or occasion which has led to the existence of these rules as rules of conduct for the community. In this sense, as expressing merely the manner in which certain courses of conduct crystallise into definite shape and attain general acceptance and observance, custom is, without

[1] See Holland, Jurisprudence, 13th ed., p. 55; Austin, Jurisprudence, ii, 533 *et seq.*

[2] Holland, pp. 50–60; *cf.* Vinn. Comm. in Inst., i. 2, 9, s. 2.

doubt, a fruitful "source" of law. This is what is implied in the maxim of the civil law—*ex non scripto jus venit.*[1]

833. The State recognition, which, as has been stated, is the condition of the binding force of a usage, may be directly or indirectly granted. Direct recognition is well illustrated by the case of the Ulster and other customs which obtained their legal force and justification in the Irish Land Act of 1870. In the great majority of cases, however, it is through the medium of judicial decision that usages obtain legal force. Into the discussion of the point of time at which the custom or usage appealed to becomes transmuted into law we need not here enter.[2] It has been maintained, on the one hand, that it is the judicial recognition of the custom which for the first time stamps upon it the imprimatur of law;[3] on the other, with perhaps greater force, that in such cases the judicial decision is declaratory, amounting only to a finding in fact that the custom appealed to exists, that it is a legal custom, and binding upon the parties.[4] It is, for practical purposes, more important to consider the conditions upon which appeal may, in any particular case, be taken to usage or custom as regulating the rights of parties.

834. Customary rules or usages may be divided into two classes: (1) such as are judicially noticed by legal tribunals, and will be enforced without proof of their existence; (2) those which must be proved before they will be recognised and enforced by the Courts.

Section 2.—Customs and Usages recognised by and incorporated in the Common Law.

835. Of these little need be said. The history of the development of the common law, notably of that part of it which is known as the law merchant, is really the history of the gradual and continuous recognition of customs and usages, general or local. Such recognition is found in the statements of legal text writers of authority and in judicial decisions. When so incorporated, they become part and parcel of the law, and as such binding upon all persons. "When a general usage has been judicially ascertained and established, it becomes part of the law merchant, which Courts of justice are bound to know and recognise."[5] Although usages and customs are frequently classified as general or as local in character, this is a cross-division merely, which in the present connection is of no legal significance. A general custom may at one time have been purely local; and *vice versa*. Many local customs are survivals of what were general customs in times prior to the union of all parts of the kingdom under one crown. The udal

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[1] See Vinn. ad Inst., i. 2, 9.

[2] See Holland, p. 60; Austin, i. 101; ii. 537.

[3] Austin, *loc. cit.*

[4] Ersk. i, 1–44; Holland, *loc. cit.*; see Vinn. Comm. in Inst., i. 2, 9, s. 4.

[5] *Brandao* v. *Barnett*, 1846, 12 Cl. & F. 787, per Lord Campbell at p. 805; *Goodwin* v. *Robarts*, 1875, L.R. 10 Ex. 337, per Cockburn C.J. at p. 346.

rights of Orkney and Shetland, and the English customs of Gavelkind and Borough English may be instanced as illustrations of this.[1] The transition stage, from customary observance to enforceable law, may be more or less rapid according to circumstances, and may be found clearly marked in the course of legal decision. Take, for example, the custom of hiring furniture, in its relation to questions of reputed ownership and as affecting the rights of creditors of the hirer. The case of *In re Matthews*,[2] in which judicial recognition was refused to the custom, may be contrasted with the case of *Crawcour* v. *Salter*,[3] six years later, in which the custom was held to be sufficiently established to receive judicial recognition.[4]

Examples of cases where custom has been recognised are to be found in the usage of trades,[5] usage sanctioning a particular form of local administration,[6] local customs affecting property rights,[7] and questions relating to jurisdiction.[8]

Section 3.—Customs and Usages not so incorporated.

Subsection (1).—*General.*

836. For practical purposes the question in each case is—What are the conditions upon which the Courts give legal effect to usage or custom when appealed to by one or other of the parties at issue? In this connection it is important to keep in view the distinction which exists between founding on usage and custom as a rule of law on the one hand, and on the other hand as interpreting or adding an implied term to a contract. In the former case the custom is referred to as being a rule of law which ought to be judicially recognised, and if the decision of the Court be in favour of the custom it declares it to be the law and binding on the parties. In the latter case proof of the custom of trade is often allowed to augment or explain the evidence afforded by the writing itself as to the intention of parties. Contracts *in re mercatoria* especially have a claim to be interpreted in this way, because they are in general expressed with brevity, on the common understanding of parties that whatever is relevant but omitted is to be supplied by reference to the custom of trade. But even mercantile contracts are in Scotland construed thus with important reservations, and the decisions shew the policy of the law to be adverse to the easy reception of evidence about the custom of trade in supplement or

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[1] See *Bruce* v. *Smith*, 1890, 17 R. 1000, per Lord Young at p. 1008; *Muggleton* v. *Barnett*, 1857, 27 L.J. Ex. 125, per Cockburn C.J. at p. 133.

[2] 1875, 1 Ch. D. 501.

[3] 1881, 18 Ch. D. 30.

[4] See *Marston* v. *Kerr's Tr.*, 1879, 6 R. 898.

[5] *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q.B. 658.

[6] *Mags. of Dunbar* v. *Heritors of Dunbar*, 1835, 1 S. & M'L. 133, at p. 195.

[7] *Learmonth* v. *Sinclair's Trs.*, 1878, 5 R. 548.

[8] *Duncan* v. *Lodijensky*, 1904, 6 F. 408.

explanation of a written document. The trend of English juristic opinion is in the same direction.[1]

837. The party founding upon a usage or custom must set out an articulate statement of it in his pleadings. The conditions under which the usage or custom will be enforced by the Courts are that it should be (1) universally acquiesced in, (2) definite and certain, (3) reasonable, (4) consistent with legal principle, and (5) not contrary to or inconsistent with a contract between the parties. Further, in cases where it is appealed to as interpreting a contract, it must be averred and proved that the parties contracted in the knowledge thereof.

Subsection (2).—*Custom must be averred and proved.*

838. The usage or custom which is pleaded as governing the case must be averred and proved in the same way as any other fact. Unless it is specially averred no proof will be allowed.[2] What shall amount to sufficient proof is largely a question of circumstances depending on the nature and extent of the alleged custom. Evidence required to establish a general custom or usage must necessarily differ from what is required to establish a custom or usage which is local and confined to a particular class of persons.

Subsection (3).—*Custom must be universally acquiesced in.*

839. In general, proof of the alleged usage or custom must stand on an aggregation of individual instances tending to shew that there is an established understanding respecting it which has been acted on by persons similarly situated.[3] Proof must be clear and distinct, and it must be shewn that the usage or custom relied on stands upon right, not upon mere licence or tolerance:[4] that the usage or right has been enjoyed or exercised uninterruptedly; and that it has been universally acquiesced in by those whom it affects. It is not necessary that the possession of the right in virtue of the usage should have been continuous.[5] But it must be shewn that it has been so generally followed as to warrant the belief that it was a rule of law to be observed and relied on. The conduct of one merchant though followed by him for many years will not support a plea of usage.[6] Evidence of what generally happens or what is frequently done will not amount to proof of

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[1] *Hutton* v. *Warren*, 1836, 1 M. & W. 466, at p. 475; *Johnston* v. *Usborne*, 1840, 11 A. & E. 549, at p. 557; *Trueman* v. *Loder*, 1840, 11 A. & E. 589, per Lord Denman at p. 597.

[2] *Mackenzie* v. *Dunlop*, 1856, 3 Macq. 22.

[3] *Ibid.*, at p. 40; *In re Matthews*, 1875, 1 Ch. D. 501; *Cunningham* v. *Fonblanque*, 1833, 6 C. & P. 44; *Hall* v. *Benson*, 1836, 7 C. & P. 711; *Holman* v. *Peruvian Nitrate Co.*, 1878, 5 R. 657; *Hogarth & Sons* v. *Leith Cotton Seed Oil Co.*, 1909 S.C. 955; *William Morton & Co.* v. *Muir Bros. & Co.*, 1907 S.C. 1211.

[4] *Mills* v. *Colchester Corporation*, 1867, 36 L.J. C.P. 210.

[5] Broom, Legal Maxims, p. 596.

[6] *Clacevich* v. *Hutcheson & Co.*, 1887, 15 R. 11; *Cazalet* v. *Morris & Co.*, 1916 S.C. 952.

custom.[1] On the other hand, custom cannot be proved by a series of protests against it.[2] Where a custom has been proved to exist in England, only slight proof will be necessary to establish a similar custom in Scotland.[3] Such custom must, however, be *in pari casu*.[4]

Subsection (4).—*Custom must be Definite and Certain.*

840. The custom alleged must be defined and certain, or capable of being rendered so.[5] It must be well established. In itself antiquity has a purely relative value, which will depend upon the nature of the alleged usage.[6] While in the case of certain customary rights, they must be shewn to have existed from what the law regards as time immemorial—so that "the mind of man runneth not to the contrary"; in other cases a comparatively short record may suffice for their establishment. "No precise time or number of facts is requisite for constituting custom, because some things require in their nature longer time, and a greater frequency of acts, to establish them than others."[7]

Subsection (5).—*The Custom must be Reasonable.*

841. The Court requires not only that a usage shall be proved to exist, but also that, as a condition of its being binding upon the parties, it shall be in itself reasonable, or, to state the proposition in what is perhaps the more accurate form, that it shall not be unreasonable.[8] It must be such as to facilitate fair dealings between parties and not to give an unfair advantage to one. It is obvious that proof that a usage is certain in character, well established, and enjoyed as matter of right, will, in most cases, afford good ground for inferring that it is not unreasonable. The very fact of the existence of the usage and its universality may go far to prove its reasonableness and its accordance with public convenience.[9] On the other hand, apparent unreasonableness in the usage alleged may reflect back upon the evidence as to its enjoyment, so as to shew that the usage, although existing from time

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[1] *Brown* v. *M'Connell*, 1876, 3 R. 788; *Fraser* v. *Patrick*, 1879, 6 R. 581; *Nisbet* v. *Mitchell-Innes*, 1880, 7 R. 575; *Abbot* v. *Bates*, 1874, 43 L.J. C.P. 150; *Strathlorne S.S. Co.* v. *Baird & Sons*, 1916 S.C. (H.L.) 134.

[2] *Strathlorne S.S. Co.*, *supra*, at p. 140.

[3] *Strong* v. *Philips & Co.*, 1878, 5 R. 770, at p. 774.

[4] *Livesey* v. *Purdom & Sons*, 1894, 21 R. 911.

[5] Broom, Legal Maxims, p. 593; see *Blewett* v. *Tregonning*, 1835, 3 A. & E. 554, per Williams J. at p. 575; *Carlyon* v. *Lovering*, 1857, 26 L.J. Ex. 251, per Watson B. at p. 957.

[6] *Noble* v. *Kennaway*, 1780, 2 Dougl. 510; *Hogarth & Sons* v. *Leith Cotton Seed Oil Co.*, 1909 S.C. 955; *Cazalet* v. *Morris & Co.*, 1916 S.C. 952.

[7] Ersk. i. 1–44.

[8] *Tyson* v. *Smith*, 1838, 9 A. & E. 406, per Tindal C.J. at p. 421; *Bruce* v. *Smith*, 1890, 17 R. 1000; see *Gibson* v. *Crick*, 1862, 1 H. & C. 142; *Marquis of Salisbury* v. *Gladstone*, 1861, 9 H.L.C. 692, at p. 701; *Hilton* v. *Earl Granville*, 1844, 5 Q.B. 701; *Rogers* v. *Brenton*, 1847, 10 Q.B. 26, per Lord Cranworth; *Devonald* v. *Rosser*, [1906] 2 K.B. 228; *Clydesdale Shipowners Co.* v. *Gallacher*, [1908] 2 I.R. (H.L.) 482; [1907] 2 I.R. 578, 602; *Cazalet* v. *Morris & Co.*, *supra*.

[9] Stair, i. 1–16; *Bruce* v. *Smith*, *supra*, per Lord Rutherfurd Clark at p. 1012.

immemorial, must have been based upon accident, or merely upon toleration, not upon right.[1] Evidence of a similar custom to that appealed to prevailing in other places and ports or in similar trades is admissible to shew that the custom sought to be established is reasonable.[2]

SUBSECTION (6).—*Custom must be consistent with Legal Principle.*

842. As a corollary from the above, it follows that no usage or custom is valid which is inconsistent with legal principle,—*Consuetudo rationem non vincit aut legem*,[3]—for this would evidence unreasonableness, the custom would be unjust, and could not therefore be presumed to be based upon the assent of the community.[4] A usage or custom must necessarily vary in some particular from the general rule of common law.[5] It is not thereby rendered void; [6] but it must not run counter to an absolute rule of law.[7] An illustration of this is afforded by the well-known case of *Ramsden* v. *Dyson*,[8] in which an attempt to extend the terms of a written lease by engrafting upon it a customary and equitable tenant right was negatived by the House of Lords, as being inconsistent with the general rule of law that the terms of the contract must be confined to those expressed in the written agreement. Thus, custom will not be permitted to affect the construction of a negotiable instrument in the hands of a *bona-fide* holder for value.[9] As to the effect of usage or custom upon the rights of persons who are not parties to the contract, see *Mitchell*.[10] It is, of course, clear that usage cannot prevail against statutory enactment.[11] The relative force and effect of custom as compared with express legislative enactment varies under different legal systems. While all systems seem to allow that customs may be abrogated or restricted by express legislation, the converse is not universally true.

SUBSECTION (7).—*Must Custom be known to Parties?*

843. It is frequently stated that knowledge of the usage or custom appealed to is in certain cases, *e.g.* when a usage is merely local, an

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[1] See *Marquis of Salisbury*, 1861, 9 H.L.C. 692, per Lord Cranworth at p. 701.

[2] *Milward* v. *Hibbert*, 1842, 3 Q.B. 120; *Fleet* v. *Murton*, 1871, L.R. 7 Q.B. 126; *Falkner* v. *Earle*, 1863, 3 B. & S. 360.

[3] *Cf.* Cod. viii. 53, 2.

[4] *Bruce* v. *Smith*, 1890, 17 R. 1000, per Lord Rutherfurd Clark at p. 1011.

[5] *Tyson* v. *Smith*, 1838, 9 A. & E. 406, per Tindal C.J. at p. 421.

[6] *Horton* v. *Beckman*, 1796, 6 T.R. 760, per Kenyon C.J. at p. 764.

[7] *Goodwin* v. *Robarts*, 1875, 1 App. Cas. 476; L.R. 10 Ex. 337, per Cockburn C.J. at p. 357; *Meyer* v. *Dresser*, 1864, 33 L.J.C.P. 289, per Erle C.J. at p. 293; see also *Crouch* v. *Crédit Foncier of England*, 1873, L.R. 8 Q.B. 374, per Blackburn J.; *Cuthbertson* v. *Lowe*, 1870, 8 M. 1073.

[8] 1865, L.R. 1 E. & I. App. 129.

[9] *Kirchner* v. *Venus*, 1859, 12 Moo. P.C. 361, per Lord Kingsdown at p. 399; *Crouch*, *supra*.

[10] *Mitchell* v. *Heys & Sons*, 1894, 21 R. 600, per Lord Kinnear at p. 609.

[11] *Mags. of Dunbar* v. *Heritors of Dunbar*, 1833, 11 S. 879; 1 S. & M'L. 134; *Dick*, 1827, 5 S. 268; *Cuthbertson* v. *Lowe*, *supra*.

essential condition of its binding character. This view, which has apparently been the occasion of some confusion in reported cases, results from a misconception of the true place of custom or usage in a legal system, and of the ground upon which it becomes obligatory. The fact of knowledge or ignorance of a usage or custom otherwise legal cannot add to or detract from its obligatory character as such. The effect of averments of ignorance of an alleged usage or custom truly falls to be considered only when custom is referred to for the interpretation of a contract. When a usage, general or local, has been incorporated with the common law, knowledge or ignorance of it has clearly no relevance. The quondam usage is now law, and knowledge of the law is conclusively presumed against everyone. *Ignorantia juris neminem excusat.*

Section 4.—Interpretation of Contract by Reference to Custom and Usage.

844. Where, as in the vast majority of cases, there is a contract relation between the parties, and an appeal to usage or custom is made by one or both, the primary object of the Court is not the ascertainment of the law governing the community in whole or in part, but the ascertainment of "the law of the contract." *Pacta dant legem contractui.* The question, in short, is one as to the intention of parties and construction of the contract. It is here, and here only, that knowledge or ignorance of the usage in question becomes relevant.

Subsection (1).—*When Custom held incorporated.*

845. The principle upon which evidence of custom or usage is admitted as affecting the terms of the contract is, that the parties to contracts made in the ordinary course of trade and without special provisions are presumed to have incorporated with their contract as implied conditions the usages and customs of the trade to which it relates. The trade as exercised and its usual practice are naturally understood to be within the intention of parties in forming their bargain, and to be relied on in the execution of it. *In contractibus tacite veniunt ea quæ sunt moris et consuetudinis.*[1] "When evidence of the usage of a particular place is admitted, to add to or in any manner to affect the constitution of a written contract, it is admitted only on the ground that the parties who made the contract are both cognisant of the usage, and must be presumed to have made their agreement with reference to it. But no such presumption can arise when one of the parties is ignorant of it."[2] It will be observed that, as stated by Lord Kingsdown, the effect of ignorance of the usage appealed to is to affect the application of the presumption, not the obligatory character of the custom, if

[1] Bell, Com. i. 465; *Kirchner* v. *Venus*, 1859, 1 Moo. P.C. 361; *Brown* v. *Byrne*, 1854, 23 L.J. Q.B. 313, per Coleridge J. at 316.

[2] *Kirchner, supra*, per Lord Kingdsown at p. 399; *Holman* v. *Peruvian Nitrate Co.*, 1878, 5 R. 657.

and when it is found to apply to the contract in question. In short, the state of knowledge of parties, while a relevant and important fact as aiding the construction of the contract, has no bearing whatever upon the binding effect of custom as such, once it is held to be incorporated with a contract. The rule of *Kirchner* and *Holman* amounts to no more than this, that, where it is unreasonable to presume that one of the parties to a contract was in knowledge of the usage, the Court will refuse to imply it as a term of the contract.[1] Whether there is or is not ground for a reasonable inference of knowledge or the reverse is simply a question on the evidence.[2] The result of the somewhat conflicting cases upon this subject seems to point to this, that where the alleged custom is merely explicative of the contract, as, *e.g.*, to translate or explain its terms, knowledge will be readily imputed.[3] Where, on the other hand, custom is invoked as introducing what practically amounts to a new term into the contract, it is reasonable that the Court should require evidence of its being known to both parties before implying it as a term of the contract.[4]

846. It may also be noted that the presumption that parties intended to incorporate with their contract, and therefore to be bound by, trade usages and customs relating thereto, will not in all cases be successfully countered by proving want of knowledge by a party to the contract.[5] Knowledge upon his part may not only be reasonably inferred against him: it may be imputed to him, and he may be held barred from asserting his ignorance. For a person who deals in a particular commodity, or who is engaged in a particular trade, entering into an ordinary contract relative thereto, is not only presumed to know, but is bound to know, the usages connected therewith.[6] He is, in short, precluded from setting up against the person with whom he dealt his ignorance of that which he ought to have known.[7]

Subsection (2).—*When Custom excluded.*

847. As proof of custom is allowed only on the assumption that on a consideration of the terms of the contract parties must be presumed to have contracted with reference to the custom, such proof will be excluded if there is anything to indicate that parties

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[1] See *Buckle* v. *Knoop*, 1867, 36 L.J. Ex. 49, per Kelly C.B. at p. 53, and Pigott B. at p. 54; *Norden S.S. Co.* v. *Dempsey*, 1876, 45 L.J. Q.B. 764, per Brett J. at p. 769.

[2] *Clayton* v. *Gregson*, 1836, 5 A. & E. 302, per Denman C.J. at p. 314, and Littledale J. at p. 315.

[3] *Robertson* v. *Jackson*, 1845, 2 C.B. 412; *Hudson* v. *Ede*, 1868, L.R. 3 Q.B. 412; *King* v. *Hinde*, 1883, 12 L.R. Ir. 113.

[4] *Kirchner*, *supra*; *Norden S.S. Co.* v. *Dempsey*, 1876, 1 C.P.D. 654; *Mollett* v. *Robinson*, 1874, L.R. 7 H.L. 802.

[5] *Hudson*, *supra*, per Blackburn J., 36 L.J. Q.B. at p. 281, and Kelly C.B., 37 L.J. Q.B. 166, at p. 167; *Forget* v. *Baxter*, [1900] A.C. 467.

[6] *Buckle* v. *Knoop*, *supra*, per Kelly C.B. at p. 53.

[7] *Mollett* v. *Robinson*, 1872, 41 L.J. C.P. 65, per Blackburn J. at p. 81, and Channell B. at p. 84; 39 L.J. C.P. 290, per Bovill C.J. at p. 294; see also 1875, L.R. 7 H.L. 802; *Brown* v. *Byrne*, 1854, 23 L.J. Q.B. 313, per Crompton J. at p. 315; *Forget* v. *Baxter*, *supra*.

did not intend that the custom should govern the contractual relation.[1] This will be inferred where the express stipulations of the contract are at variance with the custom.[2] The possibility of importing the usage of trade arises only in respect of matters as to which the written contract neither explicitly nor inferentially makes provision,[3] and arises most frequently in connection with mercantile transactions,[4] though even in that connection the presumption does not arise if the writing appear from its definiteness and detail to be a full expression of the agreement between the parties.[5]

Subsection (3).—*Explanation of Technical Terms and Phrases.*

848. Custom may always be proved to define or explain technical terms and phrases. It is the function of the judge, and not of the jury, to construe the writing.[6] Technical words, or words which, although in common use, bear, as used in the contract, a peculiar meaning, must be made intelligible to the Court, in order that effect may be given to the true intention of parties; and to this end, even in contracts which the custom of trade is not allowed to affect in any other way, evidence is competent to shew the import of the words according to the trade usage, and, as a necessary preliminary, to establish the fact of the trade usage.[7]

Section 5.—Conflict between National and Local Custom.

849. In mercantile affairs, if there be a difference between national and local custom, and if either the national or the local custom has to be supposed as implied in a particular contract, the national custom will in most cases be held to be the one implied, since the local custom is less likely to have been known to both parties.[8] This holds even as to mercantile guaranties, the limitations in which are *strictissimi juris*, except where a custom of trade can be founded on.[9] Local custom,

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[1] *Gordon* v. *Thomson*, 1831, 9 S. 735; *Gye* v. *Hallam*, 1832, 10 S. 512; *Alexander* v. *Gillon*, 1847, 9 D. 524.

[2] *Duke of Roxburghe* v. *Roberton*, 1820, 2 Bligh 156; *Gordon* v. *Robertson*, 1826, 2 W. & S. 115; *Scott and Morris* v. *Hatton*, 1827, 6 S. 233; *Gordon* v. *Anderson*, 1828, 3 W. & S. 1; *Shireff* v. *Lord Lovat*, 1854, 17 D. 177.

[3] *Hamilton* v. *Reid's Trs.*, 1824, 2 S. 611; *Hatton* v. *Pedie*, 1830, 5 Murray 155, at p. 157; *Jack* v. *Roberts & Gibson*, 1865, 3 M. 554; *William Morton & Co.* v. *Muir Bros. & Co.*, 1907 S.C. 1211.

[4] *Burbidge & Co.* v. *Sturrock*, 1832, 10 S. 520; *Schuurmans & Son* v. *Stephen & Sons*, 1832, 10 S. 839; 1833, 11 S. 779.

[5] *Gye, supra; Mackenzie* v. *Dunlop*, 1856, 3 Macq. 22; *Tancred, Arrol & Co.* v. *Steel Co. of Scotland*, 1890, 17 R. (H.L.) 31; *Wellwood's Trs.* v. *Mungall*, 1921 S.C. 911; *Palgrave, Brown & Son* v. *S.S. Turid*, [1922] A.C. 397.

[6] *Calder* v. *Aitchison & Co.*, 1831, 9 S. 777; affd. 5 W. & S. 410; *Haldane* v. *Gray*, 1842, 4 D. 1307; *Milne* v. *Samson*, 1843, 6 D. 355; *M'Dowall & Neilson's Tr.* v. *J. B. Snowball & Co.*, 1904, 7 F. 35; but see *M'Lagan & Co.* v. *M'Farlane*, 1813, Hume Dec. 101.

[7] Bell, Com. i. 456; *Robertson* v. *French*, 1803, 4 East 130, per Lord Ellenborough at p. 135; *Douglas & Co.* v. *Stiven*, 1900, 2 F. 575.

[8] *Mackenzie, supra.*

[9] *M'Lagan, supra; Tennant & Co.* v. *Bunten*, 1859, 21 D. 631.

on the other hand, will ordinarily be that held to modify contracts which are not in the narrower sense mercantile, provided the custom be prevalent over the district to which the parties belong, or with which they are connected, and in which their engagements to each other are to be fulfilled. Thus where a lease requires to be construed in the light of extrinsic evidence, the custom of the district in which the subjects are situate will be admitted, on condition of its being shewn to be really the custom of the district, and not a mere peculiarity of practice in, at most, some few instances.[1] On the same principle will be construed a contract of service,[2] or any contract which indicates a special rather than a general usage as having been within the contemplation of the parties.[3]

Section 6.—Course of Dealing between Parties.

Subsection (1).—*To explain Contracts between them.*

850. Apart from the existence of a custom of trade, whether general or local, but in such circumstances as are proper for reference to a custom of trade, a course of dealing between the parties to a contract will be admitted to explain the contract; and, even though it have taken place after the date of the contract, will be of effect, *exceptione personali*, to qualify one way or another the substance of the contract.[4] But a course of dealing cannot be proved from one or two transactions between the parties—as, for example, when there has been a single act of purchase previously to the date of the contract the construction of which is in question.[5]

851. Not only is there by the custom of trade in certain industries which have been long established, such as those carried on by calenderers, packers, auctioneers, etc., a right to retain for a general balance,[6] but in some cases, and notably in the case of bleachers, where goods are sent out as they are ready, and accounts are paid annually or at other regular intervals, there is a right, grounded on a course of dealing, to retain any parcel of goods in respect of the continuous account from one period of settlement till the next.[7]

Subsection (2).—*Effect in Bankruptcy.*

852. Besides serving, under the conditions which have been stated, to explain and more or less to qualify the import of written contracts,

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[1] *Alexander* v. *Gillon*, 1847, 9 D. 524; *Anderson and Duncan* v. *Tod*, 1809, Hume 842; *Allan* v. *Thomson*, 1829, 7 S. 784; *Marquis of Tweeddale* v. *Brown*, 1821, 2 Murray 563.

[2] *Ker* v. *Downie*, 1670, Mor. 8470; *Watt* v. *Stewart*, 1703, Mor. 8472; *Forbes* v. *Milne*, 1827, 6 S. 75.

[3] *Neilson* v. *Leighton*, 1844, 6 D. 622.

[4] *Mags. of Dunbar* v. *Heritors of Dunbar*, 1835, 1 S. & M'L. 134; *Laird & Sons* v. *Clyde Navigation Trs.*, 1882, 9 R. 711; affd. 1883, 10 R. (H.L.) 77; *Heriot's Hospital* v. *M'Donald*, 1830, 4 W. & S. 98; *Masters and Seamen of Dundee* v. *Wedderburn*, 1830, 8 S. 547; *Girdwood* v. *Campbell*, 1830, 9 S. 170; see also Sale of Goods Act, 1893, s. 55.

[5] *M'Mullan* v. *M'Phee*, 1882, 9 R. (J.) 36.

[6] *Strong* v. *Philips & Co.*, 1878, 5 R. 770; *Miller* v. *Hutcheson & Dixon*, 1881, 8 R. 489.

[7] *Anderson's Tr.* v. *Fleming*, 1871, 9 M. 718.

the usage of trade is recognised to some other effects in law. Thus, in the valuing of future debts under the Bankruptcy Statutes, although the interest to be deducted is in general, and in the absence of express stipulation, calculated at five per cent., the usage of trade, where such usage is well established, operates on its being proved, not only to fix the rate, but also to determine the time from which the interest is to run.[1] And under the Bankruptcy Act, 1913,[2] a creditor in a future debt is entitled to vote and rank for it, only after deduction of any discount beyond legal interest to which his claim is liable by the usage of trade applicable to it. This enactment strikes at the creation of an undue preference, but is subject to the common-law proviso that the discount must be of an amount sanctioned by an acknowledged rule of trade, and not suggested by a variable practice.[3] Further, transactions between a debtor and creditor in the course of trade are treated as exceptions to the Act 1696, s. 5, in the same way as cash payments. Thus, where there is a running cash account between a party and his banker or agent and the practice is for negotiable securities to be sent to the latter to be credited or lie till maturity, the sending of such documents within the days of bankruptcy will not be open to challenge.[4]

Section 7.—Action of Proving the Tenor.

853. In proving the tenor of a document which has been lost or destroyed, evidence, in support of the adminicles, is competent as to the custom of trade with reference to those matters which the document is alleged to have contained.[5]

Section 8.—Private International Law.

854. Different agricultural and commercial customs have given rise to numerous questions of international private law. Among points which may be taken as settled are these: that a lease of Scots land made abroad will be construed in Scotland with reference to the agricultural customs of Scotland;[6] that in an action on a policy of insurance with a Scots company, the equipments of sails, etc., must conform to the usage of this country rather than to that of the country where the vessel was built and where it is owned;[7] and that in a contract of sale of timber the usage at the port of delivery determines the mode of measurement.[8]

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[1] *Crawfurd and Stark* v. *Bertram*, 15th May 1812, F.C.

[2] 3 & 4 Geo. V. c. 20, s. 48.

[3] *Duncan* v. *Aitchison & Co.*, 1879, 6 R. 582.

[4] *Stein's Crs.* v. *Forbes, Hunter & Co.*, 1791, Mor. 1142; Bell, Com. ii. 202; *Horsbrugh* v. *Ramsay & Co.*, 1885, 12 R. 1171.

[5] *Crawford and Lindsay Peerage* Case, 1848, 3 Cl. & Fin. 534; 13 D. (H.L.) 32; *Brown* v. *College of St Andrews*, 1851, 13 D. 1355; Dickson on Evidence, s. 1097.

[6] *Mackintosh* v. *May*, 1895, 22 R. 345.

[7] *Cook* v. *Greenock Marine Insurance Co.*, 1843, 5 D. 1379.

[8] *Schuurmans & Son* v. *Stephen & Sons*, 1832, 10 S. 839.

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Section 1.—Introductory.

855. Customs are duties imposed from time to time upon certain commodities imported into or exported from this country. They are distinguishable from Excise duties, which are imposed upon the manufacture, sale, or consumption of commodities at home. Since the Treaty of Union of 1707 the law relating to Customs and Excise in England and in Scotland has been the same.

856. The whole provisions regulating the management and collection of the Customs are entirely statutory. The Acts relating thereto are very numerous and have been frequently consolidated. The last Consolidating Act is the Customs Consolidation Act, 1876,[1] which repeals, with certain minor exceptions, all prior statutes, and, as amended by many subsequent Acts, is the law in force regulating Customs. The Consolidation Act deals with the management of the Customs, the prohibition of the importation of certain goods either wholly or under restriction, the importation of goods, including their examination, landing, and warehousing, the export of goods and the regulations which

[1] 39 & 40 Vict. c. 36.

must be observed by ships outward bound from the United Kingdom, regulations for coastwise trade and the prevention of smuggling. The principal provisions dealing with these matters are as follows:—

Section 2.—Management of the Customs.

857. The collection and management of the Customs duties of the United Kingdom are under the control of the Board of Customs, which consists of any number of Commissioners, not exceeding five, appointed by letters patent by the Crown. These officials are designated Commissioners of Customs and Excise.[1] They hold their office under the Crown and are subject to the control of the Treasury.[2] Their powers are extensive, and include authority to make regulations for the prevention of smuggling and to enforce proceedings for the recovery of penalties under any statute imposing Customs duties.[3] They have power to restore goods seized or to mitigate or remit any fine or penalty under the Customs Acts.[4] Except where otherwise provided, the Acts relating to Customs extend to all British possessions abroad.[5] The powers and authorities vested in the Commissioners under these Acts are now vested in the Governor or other Government Administrator in such possessions.[6]

858. Officers of Customs and Excise are appointed by the Commissioners for the management of the Customs and the performance of all duties connected therewith.[7] In pursuit of their duties they have power to enter into any harbour, dock, or pier,[8] board and search any ship,[9] and open packages.[10] They may search persons suspected of having smuggled goods concealed upon them,[11] and they are empowered to seize and detain ships, boats, horses, and other things and animals used in the importation, landing, or conveyance of any uncustomed, prohibited, or other goods liable to forfeiture under the Customs Acts.[12] They can arrest and detain any person found carrying or removing any spirits and may seize any spirits or goods forfeited under the Spirits Act, 1880.[13] Customs officers can also, under the order and directions of the Commissioners, prosecute, defend, or conduct any proceedings before any justice in any matter relating to the Customs.[14] Customs and Excise officers and Commissioners cannot be compelled to serve on juries or in any public office.[15]

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[1] 8 Edw. VII. c. 16, s. 4; Order in Council, 15th February 1909.
[2] 39 & 40 Vict. c. 36, ss. 1 and 2.
[3] *Ibid.*, ss. 169, 197, 208, 209, 211, 212, 213.
[4] 53 & 54 Vict. c. 21, s. 35.
[5] 39 & 40 Vict. c. 36, s. 151.
[6] *Ibid.*, s. 149.
[7] *Ibid.*, s. 3.
[8] 10 & 11 Vict. c. 27, s. 28.
[9] 39 & 40 Vict. c. 36, ss. 47, 134, 147, 182.
[10] *Ibid.*, ss. 54, 102.
[11] 44 & 45 Vict. c. 12, s. 12.
[12] *Ibid.*, s. 202.
[13] 43 & 44 Vict. c. 24, ss. 145, 154.
[14] 39 & 40 Vict. c. 36, s. 273.
[15] *Ibid.*, s. 9.

Section 3.—Importation of Goods.

Subsection (1).—*General.*

859. Under the Consolidation Act of 1876 the import of certain goods is absolutely prohibited and the import of other goods is permitted only under certain restrictions and regulations.[1] The list of such goods, the import of which is so admitted, forms the basis of the present list of articles which may be brought into this country under payment of Customs duties. This list has been amended and added to by numerous subsequent Acts. Dutiable goods may be imported under certain conditions, of which the following are the principal.

Subsection (2).—*Landing of Goods.*

860. When an incoming ship arrives within four leagues of the coast of the United Kingdom the bulk must not be broken or stowage altered.[2] The goods may be imported into the United Kingdom only by and into such ports, quays, and sufferance wharfs as have been appointed by Treasury warrant, and subject to regulations made by the Commissioners.[3] Goods landed in any other way may be forfeited.[4] The master or responsible officer must, within twenty-four hours of the arrival of his ship from beyond the seas, and before breaking bulk, report to the Customs officer by statutory form, amongst other details, the particulars of the cargo.[5] Failure to make such report renders the offender liable to a penalty of £100 and the goods not so reported may be detained.[6]

861. The importer of dutiable goods must make entry thereof with the Customs authorities. If the goods are to be delivered for home consumption on landing, he must, before unshipment, make "perfect entry" by delivery to the Customs collector of an entry in the statutory form, and thereafter must make immediate payment of the duties payable. The entry signed by the Customs collector is the warrant for the landing and delivery of the goods.[7] The importer of goods intended to be warehoused without payment of duty on the first entry thereof must deliver to the collector of Customs a "Bill of Entry" in the statutory form. The bill, when signed by the collector, is the warrant for the warehousing of the goods.[8]

862. When the exact description of the goods is not fully known to the importer he must make entry by a "Bill of Sight" before the Customs collector in the statutory form,[9] which, when delivered to and signed by the collector, is the warrant for provisionally landing the

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[1] 39 & 40 Vict. c. 36, s. 42. [2] *Ibid.*, s. 53.
[3] *Ibid.*, ss. 11, 12, 14; 44 & 45 Vict. c. 12, s. 18; 61 & 62 Vict. c. 46, s. 5; 3 Edw. VII. c. 46, s. 4; 45 & 46 Vict. c. 72, s. 2.
[4] 44 & 45 Vict. c. 12, ss. 9, 13.
[5] 39 & 40 Vict. c. 36, s. 50; 61 & 62 Vict. c. 46, s. 2. [6] 39 & 40 Vict. c. 36, s. 5.
[7] *Ibid.*, ss. 55, 56. [8] *Ibid.*, s. 57. [9] *Ibid.*, s. 58.

goods for examination in presence of Customs officers. Within three days, or such other time as the Commissioners may allow after the landing, but before the delivery of the goods, the importer must make "perfect entry" by endorsing upon the Bill of Sight full particulars of the goods.[1] Goods entered by Bill of Sight are not delivered unless duty thereon is paid or deposited.[2] In default of perfect entry of goods landed by Bill of Sight within three days of the landing thereof, or such time as the Commissioners shall allow, Customs officers may take the goods to a Government warehouse, and failing perfect entry being made within one month after the landing of the goods and payment of the duties and expenses, such goods shall be sold.[3]

863. No goods (with certain exceptions, such as bullion and diamonds, etc., imported in British ships) shall be landed on Sundays or holidays, or except within certain hours on other days, unless with consent of the Commissioners. They must be landed only with the permission and in the presence or with the authority of the Customs officials, and only at a quay or wharf duly appointed for that purpose.[4]

Subsection (3).—*Warehousing.*

864. Goods which are to be warehoused must, upon being entered and landed, be produced to the proper officer of Customs, whose duty it is to examine them and to take an exact account of the contents of the packages in a landing book.[5] On the completion of the entry and examination of the goods, they may either be warehoused or dispatched for home consumption. The duties on such goods are ascertained and paid according to this landing account,[6] except in the case of tobacco, wine, spirits, certain dried fruits,[7] sugar and molasses,[8] upon which the duties are chargeable on the weight, measure, or strength at the time of actual delivery. Goods warehoused shall be taken or delivered from the warehouse, and only upon due entry and under the care of Customs officers for exportation, or upon due entry on payment of the full duties payable for home use.[9]

865. Goods deposited in a warehouse without payment of duty upon the first importation thereof, or which may be imported and on board ship, are, upon being entered for home consumption, subject to such duties as may be due at the time of passing such entry (*i.e.* of removing the goods from warehouse, etc).[10] Goods warehoused and afterwards delivered for home consumption are liable to duty at the rate in force at the date of actual removal from warehouse.[11] In the case of goods, subject to Customs duties, which have been delivered out of a warehouse for removal under bond to be re-warehoused, and upon which duty has been paid before re-warehousing, the rate of duty applicable is that

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[1] 39 & 40 Vict. c. 36, s. 59. [2] *Ibid.*, s. 60. [3] *Ibid.*, s. 61.
[4] 44 & 45 Vict. c. 12, s. 9. [5] 39 & 40 Vict. c. 36, s. 77.
[6] *Ibid.*, s. 78. [7] *Ibid.*, s. 98. [8] 3 Edw. VII. c. 46, s. 3.
[9] 39 & 40 Vict. c. 36, s. 97. [10] *Ibid.*, s. 19. [11] 63 & 64 Vict. c. 7, s. 9.

chargeable at the time it was actually paid.[1] If there be any dispute as to the proper rate of duty payable on any imported goods, the importer or consignee must deposit with the collector of Customs the duty demanded. This shall be taken to be the proper duty payable unless the importer shall take legal action within three months against the collector of Customs to ascertain the proper duty payable on such goods.[2] In the case of certain goods (motor cars, musical instruments, clocks, and watches) the dispute is referred to a referee appointed by the Treasury, whose decision is final.[3]

866. Goods placed in a warehouse (which must be approved by the Commissioners [4] at warehousing ports appointed by the Treasury) [5] must be produced by the warehouse keeper on demand by a Customs officer under penalty on failure.[6] The warehouse keeper must give security by bond, or such other security as the Treasury or the Commissioners may approve, for payment of the duties payable on goods stored, or for the due exportation thereof.[7]

Section 4.—Export of Goods.

867. The master of a ship exporting goods from the United Kingdom, or his agent, must deliver to the collector of Customs a certificate of due clearance inwards or coastwise of such ship of her last voyage, and must also deliver an entry outwards of such ship in the form authorised. This must be done before any goods, except heavy goods for exportation loaded under a "stiffening order" for the purpose of ballast, have been placed on board.[8] Goods warehoused for export and drawback goods must be shipped only at times and from places appointed for the purpose and with the authority or in the presence of Customs officials, who may open packages and examine goods. Due entry outwards of the ship and due entry of such goods and due clearance thereof for shipment must also have been made prior to export.[9]

868. The Commissioners of Customs may order due entry and clearance before shipment of any goods intended for exportation, if in their opinion it is expedient in the public interests.[10] Failure to obey such order renders the exporter liable to a penalty of £100 in respect of each offence.[11] The exporter of warehoused goods, British wrought plate, or goods entitled to any drawback on exportation (which may be exported on ships of at least forty tons registered tonnage), or goods exportable only under regulations or restrictions, shall, prior to shipment, deliver to the proper Customs officer such security as the Commissioners shall require that such goods shall be duly shipped, exported, and landed at the place where they are entered outwards, within such

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[1] 1 & 2 Geo. V. c. 48, s. 3.
[2] 39 & 40 Vict. c. 36, s. 31.
[3] 5 & 6 Geo. V. c. 89, s. 12; 10 & 11 Geo. V. c. 18, s. 10 (2).
[4] 39 & 40 Vict. c. 36, s. 39.
[5] *Ibid.*, s. 12.
[6] *Ibid.*, ss. 81, 82.
[7] *Ibid.*, s. 13.
[8] *Ibid.*, s. 101.
[9] *Ibid.*, s. 102; 40 & 41 Vict. c. 13, s. 3.
[10] 39 & 40 Vict. c. 39, s. 139.
[11] 5 Geo. V. c. 7, s. 11.

time as the Commissioners shall deem reasonable.[1] In the case of goods manufactured in the United Kingdom and composed partly of sugar, molasses, glucose, and saccharine, or of preparations of cocoa and dried fruit, the Commissioners, with the consent of the Treasury, may, in order to facilitate trade, relax this regulation as regards the giving of security and examination.[2]

869. Before shipment of goods upon which drawback on exportation is to be claimed, the exporter must deliver to the proper officer of Customs a shipping bill in the statutory form, containing, *inter alia*, a description of the goods,[3] and this bill, when signed by the exporter or the consignee and countersigned by the export officer, is the clearance for all the goods enumerated.[4]

870. The exporter of goods for which no bond is required must, within six days after the final clearance outwards of the exporting ship, or such period as the Commissioners may direct, deliver a specification with particulars of such goods.[5] Further, the master or owner of the ship must, within the same period, deliver a manifest of all the shipped goods of every kind with full details.[6] Before any ship is cleared outwards from the United Kingdom the master must attend before the collector of Customs and must answer all questions concerning the ship, cargo, and voyage, and must also sign and deliver a "content" of the ship in form authorised by the Act. He is then given a clearance certificate which is the authority for the departure of the ship.[7]

871. Any Customs officer may board any ship, after clearance outwards, within the limits of another port in the United Kingdom, or within one league of the coast, and may demand the ship's clearance.[8] Any ship sailing from any port of the United Kingdom may be required to bring-to at a station appointed by the Commissioners of Customs for the landing of Customs officers or for further examination previous to her departure.[9]

872. Under the Customs and Inland Revenue Act of 1879[10] the export of arms and certain goods forming munitions of war, and articles capable of being used in the manufacture thereof, may be prohibited by a Proclamation or Order in Council. This power of prohibition was extended during the war to the export of all articles of every description,[11] and was later applied to weapons and munitions of war and every description of firearms which were not weapons of war, to ship's stores, and to many other goods.[12]

Section 5.—Coasting Trade.

873. The term "coasting trade" includes all trade by sea from any one port of the United Kingdom to any other port, and ships employed

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[1] 39 & 40 Vict. c. 36, s. 104.
[2] 1 Edw. VII. c. 7, 2nd Schedule; 1 & 2 Geo. V. c. 48, s. 2; 6 & 7 Geo. V. c. 24, s. 21.
[3] 39 & 40 Vict. c. 36, s. 105. [4] *Ibid.*, s. 113. [5] 44 & 45 Vict. c. 12, s. 11.
[6] 47 & 48 Vict. c. 62, s. 3 (1). [7] 39 & 40 Vict. c. 36, s. 128. [8] *Ibid.*, s. 134.
[9] *Ibid.*, s. 136. [10] 42 & 43 Vict. c. 21, s. 8. [11] 4 & 5 Geo. V. c. 64, ss. 1, 2,
[12] 11 & 12 Geo. V. c. 32, s. 17; 5 Geo. V. c. 2, ss. 1, 2.

in this trade are deemed to be coasting ships.[1] Foreign ships engaged in the coasting trade are subject to the same laws and regulations as British ships.[2] The Treasury may determine in what cases the trade by water from one port of the United Kingdom to another shall or shall not be deemed a trade by sea within the meaning of the Acts relating to the Customs.[1] In accordance with their powers, the Treasury have directed that the trade within certain specified limits in the estuaries of the Clyde and Forth shall not be deemed to be a trade by sea.

874. A coasting ship must not deviate from her voyage and must engage solely in coasting trade.[3] The times and the places for unloading or shipping coastwise borne goods are appointed by the Customs officials.[4] The master of the ship must keep a cargo book in which, at every port of loading and discharging, he must enter a detailed account of all goods there shipped or unshipped. The cargo book must be produced for the inspection of Customs officials.[5] Previous to the departure of a coasting ship from her port or place of lading a "transire" or statutory form of account of particulars of the ship and her cargo must be furnished to the collector of Customs or other proper officer. The transire, when dated and signed by the Customs officer, forms the clearance to the ship and the cargo for her voyage and the pass for the goods. The Commissioners may permit general transire under such regulations as they may deem fit.[6] Within twenty-four hours after the arrival of a coasting ship at the port or place of discharge, and before any goods are unladen, the transire must be delivered to the Customs.[7] Customs officers may go on board any coasting ship in any port or place in the United Kingdom or at any period of her voyage, search such ship and examine all goods on board and all goods then lading or unlading, and demand production of all documents which ought to be on board such ship.[8]

Section 6.—Drawbacks.

Subsection (1).—*Introductory.*

875. "Drawback" is the repayment of a duty previously paid upon the exportation of excisable articles or upon the re-exportation of foreign goods. The object of a drawback is to enable commodities which are subject to taxation to be exported and sold in a foreign country on the same terms as goods from countries where they are untaxed.[9] Under the Customs Consolidation Act, 1876, the term "drawback" includes "bounty,"[10] which, as opposed to a drawback, is a premium paid by Government to encourage some branch of industry,[11] to enable certain classes of goods manufactured in this country to be sold abroad at a price less than the cost of production. All drawbacks and allowances

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[1] 39 & 40 Vict. c. 39, s. 140. [2] *Ibid.*, s. 141. [3] *Ibid.*, s. 142.
[4] 44 & 45 Vict. c. 12, s. 10. [5] 42 & 43 Vict. c. 21, s. 9.
[6] 39 & 40 Vict. c. 36, s. 144. [7] *Ibid.*, s. 146. [8] *Ibid.*, s. 147.
[9] Encyclopædia Britannica. [10] 39 & 40 Vict. c. 36, s. 284.
[11] Webster's International Dictionary.

now imposed and allowed, or which may hereafter be imposed or allowed by law, are under the management of the Commissioners of Customs and Excise, and are payable in British currency and according to Imperial weights and measures.[1]

876. At present Customs drawbacks are allowed on the following goods, upon which Customs duty on import has been paid: Beer;[2] chicory and mixtures of coffee and chicory and coffee;[3] goods other than beer in the manufacture of which, in the United Kingdom, any sugar, molasses, extracts of sugar of certain descriptions, glucose or saccharine,[4] or any cocoa, cocoa butter, or dried fruit has been used;[5] molasses produced in the United Kingdom and delivered to a licensed distiller for use in the manufacture of spirits;[6] spirits consisting of British compounds of various kinds, such as medicinal liqueurs, tinctures, flavoured essences, and perfumed spirits;[7] sugar which has passed a refinery in the United Kingdom;[8] and tobacco in various forms.[9] Drawbacks are also allowed upon cinematograph films, clocks and watches and their component parts, motor cars, including motor bicycles and tricycles and their accessories and component parts, and musical instruments of certain kinds and their accessories.[10]

Subsection (2).—*Payment.*

877. An exporter of goods entitled to drawback on exportation must, prior to shipment, deliver to the proper Customs official a "Bond Note" or account of such goods, and give security by bond that the goods shall be duly exported and landed at the place for which they are entered outwards.[11] He must also deliver a shipping bill in statutory form containing particulars of the goods.[12] Goods upon which drawback is claimed or allowed, if found on examination by the Customs officers not to agree with the entry in the shipping bill or to be of less value for home use than the amount of drawback claimed, shall be forfeited, and the person entering such goods and claiming drawbacks thereon shall forfeit £100, or, at the election of the Commissioners, treble the amount of the drawback claimed.[13] Goods shipped on drawback must not be re-landed.[14] The provisions of the Customs Act, with reference to the exportation of warehoused goods, so far as applicable, apply to goods exported on drawback.[15] No person shall export goods entitled to drawback on exportation or

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[1] 39 & 40 Vict. c. 36, s. 17.
[2] 10 & 11 Geo. V. c. 18, s. 5 (3).
[3] 6 & 7 Geo. V. c. 24, s. 22; 9 & 10 Geo. V. c. 32, s. 10.
[4] 1 Edw. VII. c. 7, s. 2 (1) and 2nd Schedule; 8 & 9 Geo. V. c.15, s. 8 and 3rd Schedule.
[5] 1 & 2 Geo. V. c. 48, s. 2 (2); 6 & 7 Geo. V. c. 24, s. 21 (1).
[6] 8 & 9 Geo. V. c. 15, s. 8 and 3rd Schedule; 9 & 10 Geo. V. c. 32, s. 10.
[7] 43 & 44 Vict. c. 24, s. 95 (11); 6 Edw. VII. c. 20, s. 3 (1) and (2).
[8] 1 Edw. VII. c. 7, s. 2 and 2nd Schedule.
[9] 8 & 9 Geo. V. c. 15, s. 7 and 2nd Schedule; 9 & 10 Geo. V. c. 32, s. 10.
[10] 5 & 6 Geo. V. c. 89, s. 13 (1).
[11] 39 & 40 Vict. c. 36, s. 104.
[12] *Ibid.*, s. 105.
[13] *Ibid.*, s. 106.
[14] 57 Geo. III. c. 87, s. 12; 26 & 27 Vict. c. 33, s. 16.
[15] 39 & 40 Vict. c. 36, s. 109.

shall enter any such goods for exportation from the United Kingdom to ports beyond the seas in any ship of under 40 tons' registered tonnage.[1]

878. When goods duly shipped for exportation have, before such exportation, been destroyed by accident or damaged, any drawback or allowance payable in respect to the goods shall be payable as if the goods had been actually exported.[2] In order to compute and pay any drawback claimed and payable on goods entered, shipped, and exported, a "debenture" shall, after such entry, be prepared by the proper Customs official, certifying the entry outwards of such goods; and when the goods have been exported and a notice of the particulars of the goods has been delivered by the exporter to the export officer, the shipment and exportation shall be certified upon the debenture by the export officer.[3] The person entitled to the drawback must sign a declaration on the debenture that the goods mentioned therein have been actually exported and have not been re-landed and are not intended to be re-landed in any part of the United Kingdom, and that he was at the time of the entry and shipping, and continued to be, entitled to the drawback thereon.[4] No debenture for any drawback allowed upon the exportation of any goods shall be paid after the expiration of two years from the date of the shipment of such goods.[5] This provision has been extended for the payment of allowances in respect of spirits exported, used, or deposited, payable under the Customs and Inland Revenue Act, 1885, s. 3, as amended by the Revenue Act, 1889, s. 21.

879. If goods upon which drawback is payable on export are shipped, or entered to be shipped, on board a vessel of less than 40 tons' burden, or are not duly exported to and landed in ports beyond the seas, or if they are unshipped or re-landed in any part of the United Kingdom, they shall be forfeited along with the ship, and the master of such ship, or any person on whose order such goods were unshipped or re-landed, shall forfeit a sum equal to treble the duty-paid value of such goods or a penalty of £100.[6]

Section 7.—Dutiable Goods and Duties.

Subsection (1).—*Introductory.*

880. In recent years Customs duties have been modified in certain cases in order to confer a preference upon goods produced in the British Empire. In other cases, for the purpose of protecting certain British industries, the list of goods of foreign manufacture imported into the United Kingdom on which Customs duties are payable has been extended.

Subsection (2).—*Imperial Preference.*

881. The rates of Customs duties payable on the importation of goods into this country have been modified by the principle of "Imperial

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[1] 39 & 40 Vict. c. 36, s. 100. [2] 8 & 9 Geo. V. c. 15, s. 15.
[3] 39 & 40 Vict. c. 36, s. 117. [4] *Ibid.*, s. 118. [5] *Ibid.*, s. 119. [6] *Ibid.*, s. 120.

Preference." The Finance Act of 1919,[1] which first introduced this principle, provides that the duties of Customs on the goods specified in its Second Schedule shall be charged at the reduced or "preferential" rates specified in the said schedule where such goods are shown to the satisfaction of the Commissioners of Customs and Excise to have been consigned from, and grown, produced, or manufactured in the British Empire. The term "British Empire" is expressed to mean any of His Majesty's dominions outside Great Britain and Ireland and any territories outside His Majesty's protection, and to include India. This definition also includes any territories that may come under the protection of the Government or in respect of which a mandate of the League of Nations is exercised by the Government in any part of His Majesty's dominions, and which may be declared by Order in Council to be included within the definition of the British Empire for the purposes of the Act.[2] It is also provided that goods shall not be deemed to have been manufactured in the British Empire unless such proportion of their value as is prescribed by regulations made by the Board of Trade is the result of labour within the British Empire.[2]

882. The list of goods of Empire origin which are chargeable upon import with preferential duties is set forth in the Finance Act, 1919,[3] as amended by the Finance Acts of 1925 [4] and 1926.[5] The list includes tea, cocoa, coffee, chicory, currants, dried or preserved fruits, sugar, glucose, molasses, saccharine, tobacco, wine and certain kinds of spirits, motor cars, bicycles and tricycles and their accessories or component parts, musical instruments and their accessories and component parts, clocks and watches and their component parts, cinematograph films, silk and artificial silk, hops, lace, and embroidery. The preferential duties on all these goods are to be charged for a period of ten years from 1st July 1926.[6]

Subsection (3).—*Safeguarding of Industries.*

883. The list of foreign goods upon the import of which Customs duty is payable has been extended recently by the provisions of the Safeguarding of Industries Act, 1921,[7] which provides for a charge of Customs import duties for a period of five years from 1st October 1921,[8] equal to one-third of their value (*i.e.* the price which an importer would give for the goods delivered in bond at the port of importation, freight and insurance paid).[9] In the schedule to this Act dealing with goods chargeable with duty are included optical glass and instruments, scientific glass and porcelain, various scientific instruments, wireless valves, ignition magnetos, arc lamp carbons, metallic tungsten, ferro

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[1] 9 & 10 Geo. V. c. 32, s. 8. [2] *Ibid.*, s. 8 (1).
[3] *Ibid.*, Schedule II.
[4] 15 & 16 Geo. V. c. 36, ss. 8, 9, and Schedule III.
[5] 16 & 17 Geo. V. c. 22, s. 7 (1).
[6] 15 & 16 Geo. V. c. 36, ss. 8, 9; 16 & 17 Geo. V. c. 22, s. 7.
[7] 11 & 12 Geo. V. c. 47. [8] *Ibid.*, s. 16. [9] *Ibid.*, s. 10.

tungsten, and components of thorium, cerium, and other raw materials, and various synthetic organic chemicals. The rate of duty is now half of the value of the goods imported, and the duties are continued for a period of ten years from 19th August 1926.[1]

884. Under this Act, upon complaint being made that foreign goods are being "dumped" in this country either at prices below their cost of production or at prices which, by reason of the depreciation in the value in relation to sterling of the currency of the foreign country in which the goods are manufactured, are below the prices at which similar goods can be profitably manufactured in the United Kingdom, power is given to the Board of Trade to refer the matter for inquiry to a committee constituted for the purpose of hearing such complaints,[2] and upon the report of the committee the Board of Trade may, by order, apply the provisions of the Act to imported goods of foreign origin with regard to the import of which a complaint has been made.[3] The provisions of the Safeguarding of Industries Act have been applied to fabric gloves, glove fabric, plain domestic glass-ware, illuminating glass-ware (except electric bulbs and oil lamp chimneys), domestic hollow-ware, and incandescent light mantles.[4] Under the Safeguarding of Industries (Customs Duties) Act, 1925, Customs duties on the import of certain kinds of cutlery, and gloves and incandescent mantles and certain materials used in their manufacture, are imposed for a period of five years from the commencement of the Act, 21st December 1925.[5]

Subsection (4).—*Dutiable Goods.*

885. The following are the principal goods upon which importation Customs duties are payable.

(i) *Beer and Hops.*

886. For the purpose of duty, beer is specified as (*a*) mum, spruce, black, and Berlin beer, or beers of a similar character, or (*b*) beers of other descriptions. The original specific gravity of beer is the basis upon which duty is payable.[6] Hops, under the Finance Act, 1925,[7] are liable to Customs duty on importation. A duty is also payable on the import of every extract made from hops. These duties have been imposed for a period of four years from 16th August 1925.

(ii) *Playing Cards.*

887. The duty upon imported playing cards (which must not be sold without a wrapper provided by the Commissioners of Inland Revenue

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[1] 16 & 17 Geo. V. c. 22, s. 10. [2] 11 & 12 Geo. V. c. 47, s. 2 (1). [3] *Ibid.*, s. 2 (3).
[4] S.R. & O., 1922, No. 853. [5] 15 & 16 Geo. V. c. 79, s. 1 (1) and Schedule I.
[6] 43 & 44 Vict. c. 20, s. 14; 44 & 45 Vict. c. 12, ss. 3, 5 (1); 52 & 53 Vict. c. 7, s. 3; 59 & 60 Vict. c. 28. ss. 2, 3; 63 & 64 Vict. c. 7, ss. 3, 4; 2 Edw. VII. c. 7, s. 2; 10 Edw. VII. c. 8, s. 82 (1) and (2); 5 Geo. V. c. 7, s. 7; 10 & 11 Geo. V. c. 8, s. 5; 15 & 16 Geo. V. c. 36, s. 7 (2), (3), and (4).
[7] 15 & 16 Geo. V. c. 36, s. 7 (1).

indicating that duty has been paid)[1] is reckoned on each dozen packets.[2]

(iii) *Chicory and Coffee.*

888. These are described as either raw or kiln-dried or roasted and ground, or as mixtures with each other or with any other vegetable substance, and as such are liable to Customs duty.[3] The importation of extracts, essences, or other concentrations of chicory or coffee is forbidden except in transit or to be warehoused for exportation only.[4] Reduced rates of duty are charged upon products of the British Empire.[5]

(iv) *Cinematograph Films.*

889. Imported films for the purpose of duties are classified as blank film, positives, and negatives, and the duty is calculated on each lineal foot of film.[6] Films of Empire origin are charged preferential rates.[5]

(v) *Clocks, Watches, and their Component Parts.*

890. These are subject, on importation, to an *ad valorem* duty of one-third of their value. Preferential rates are charged upon Empire goods.[5]

(vi) *Cocoa.*

891. Duty at varying rates is charged on the importation of cocoa according as it is in the form of cocoa husks, shells, cocoa butter, or preparations of cocoa and chocolate.[7] Reduced rates of duty are charged upon these articles if of Empire origin.[5]

(vii) *Fruit, Dried or Preserved.*

892. Import duties are charged on currants, figs, fig-cake, plums, prunes, and raisins.[8] On delivery from the warehouse for home consumption duty on plums and prunes is calculated on the weight on landing, but the duty on figs, currants, and raisins is charged on the weight thereon at the time of actual delivery from the warehouse.[9] Dried fruit preserved in syrup is liable further for the sugar duty on the syrup.[10] Reduced duties are payable upon products of the British Empire.[5]

(viii) *Lace.*

893. Lace made of cotton, silk, or other fibre, hand or machine made, the products of certain lace-making machines, also embroidery manu-

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[1] 16 & 17 Vict. c. 107, ss. 114, 115.
[2] 39 & 40 Vict. c. 35, Schedule.
[3] *Ibid.*; 6 & 7 Geo. V. c. 24, s. 3.
[4] 39 & 40 Vict. c. 36, s. 42.
[5] 9 & 10 Geo. V. c. 32, s. 8 and Schedule II.
[6] 5 & 6 Geo. V. c. 24, s. 8; 15 & 16 Geo. V. c. 36, s. 3 (1).
[7] 39 & 40 Vict. c. 35, Schedule; 59 & 60 Vict. c. 28, s. 7; 14 & 15 Geo. V. c. 21, s. 2.
[8] 39 & 40 Vict. c. 35, Schedule; 53 & 54 Vict. c. 8, s. 3; 5 & 6 Geo. V. c. 89.
[9] 39 & 40 Vict. c. 36, s. 98.
[10] 1 Edw. VII. c. 7, s. 2 (2).

factured on net or any fabric which wholly or partially is eliminated before the article reaches its final stage, are all liable to an *ad valorem* duty of 33⅓ per cent. of the value of the goods on importation during a period of five years from 1st July 1925.[1] Preferential rates are charged upon lace goods if of Empire origin.[2]

(ix) *Matches.*

894. Matches in boxes containing a certain number pay duty on each 10,000 boxes.

(x) *Molasses and Glucose.*

895. Duty is charged upon molasses [3] (except when cleared for use by a licensed distiller and used in the manufacture of spirit,[4] or when used solely as food for stock); [5] upon invert sugar and upon all other sugars and extracts from sugar which cannot be completely tested by the polariscope and on which duty is not otherwise charged.[6] The rate of the duty depends upon the percentage of sweetening matter in the goods. There is a preference by way of reduced duties on the import of molasses and glucose of British Empire origin.[7]

(xi) *Motor Cars.*

896. Motor cars (including bicycles and tricycles) and their component parts and accessories (except tyres), are subject to an *ad valorem* import duty of 33⅓ per cent.[8] British Empire made motors, etc., are entitled to the preferential rates of duties on import.[9]

(xii) *Musical Instruments.*

897. These include gramophones, pianolas, and accessories and component parts of musical instruments and gramophone records, and are subject to an *ad valorem* duty on importation of 33⅓ per cent.[10] Musical instruments of Empire manufacture are subject only to preferential rates of duty upon import.

(xiii) *Saccharine.*

898. On imports of saccharine and substances of a like nature Customs duty is payable.[9] Goods of Empire origin pay only preferential rates of duty on import.

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[1] 15 & 16 Geo. V. c. 36, s. 6 (1).
[2] *Ibid.*, s. 9 (2) and Schedule III.
[3] 9 & 10 Geo. V. c. 32, s. 8 and Schedule II.
[4] 1 Edw. VII. c. 7, s. 2; 8 Edw. VII. c. 16, Schedule; 8 & 9 Geo. V. c. 15, s. 8 and Schedule III.
[5] 1 Edw. VII. c. 7, s. 8.
[6] 3 Edw. VII. c. 46, s. 1 (1).
[7] 15 & 16 Geo. V. c. 36, s. 8 (1) and Schedule III.
[8] 5 & 6 Geo. V. c. 89, s. 12; 15 & 16 Geo. V. c. 36, s. 3 (1).
[9] 15 & 16 Geo. V. c. 36, s. 9 (2) and Schedule III.
[10] *Ibid.*, s. 3 (1).

(xiv) *Spirits.*

899. This term includes brandy, rum, imitation rum, or Geneva or other unsweetened spirits, perfumed spirits, liqueurs, cordials, and other mixtures in bottles, also spirits of any other description, including naphtha and methylic alcohol purified so as to be potable, mixtures and preparations containing spirit, and mixtures, compounds, and preparations containing spirit and chargeable with duty in respect thereof, and which are recognised by the Commissioners as being used for medical purposes.[1] The rate of duty on spirits varies according to the class or description, and is calculated upon the proof gallon, except in the cases of perfumed spirits, untested spirits (liqueurs, cordials, etc.), and sweetened medicinal mixtures and preparations, the duty on which is chargeable on the liquid gallon. "Proof" strength, as defined by statute, means the strength denoted by Sykes' hydrometer as ascertained by a Customs officer,[2] or as ascertained by any means prescribed by regulations made by the Commissioners.[3] Restrictions on the delivery of immature spirits for the purpose of home consumption have been imposed by various Acts [4] and by orders made under and in pursuance thereof. The importation, warehousing in bonded stores, delivery therefrom for home consumption, calculation and payment of duties, and the exportation of spirits, are all regulated under numerous statutes.[5] Reduced duties are charged upon products of the British Empire.[6]

(xv) *Sugar.*

900. Customs duty on sugar depends upon the degree of polarisation of the imported article, and is calculated upon the hundredweight.[7] Prohibition of the import of sugar from any foreign country where a bounty is granted on the production or export of sugar may be enforced under an Order in Council subject to any provision that may be made by Parliament in lieu of such prohibition to impose a special duty on such sugar.[8] Imported sugar may either be warehoused for home consumption or future re-export, or may be delivered at once for home consumption on payment of duty.[9] The duty is payable on the ascertained weight at the time either of landing or of delivery from the warehouse for home consumption.[10] Customs duty is also payable on goods

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[1] 44 & 45 Vict. c. 12, s. 7; 53 & 54 Vict. c. 8, s. 4; 62 & 63 Vict. c. 9, s. 3; 63 & 64 Vict. c. 7, s. 5; 2 Edw. VII. c. 7, s. 5; 10 Edw. VII. c. 8, s. 81; 10 & 11 Geo. V. c. 18, ss. 3, 4, and Schedule I.

[2] 43 & 44 Vict. c. 24, s. 134.

[3] 7 Edw. VII. c. 13, s. 4.

[4] 5 & 6 Geo. V. c. 46; 6 & 7 Geo. V. c. 24, s. 23.

[5] 39 & 40 Vict. c. 36, ss. 42, 95, 103, 159, 162, 170, 200, 213, 233, 282; 42 & 43 Vict. c. 21, s. 10; 43 & 44 Vict. c. 24; 44 & 45 Vict. c. 12, s. 8; 46 & 47 Vict. c. 55, s. 3; 53 & 54 Vict. c. 8; 58 & 59 Vict. c. 16; 5 & 6 Geo. V. c. 62, ss. 2, 8; 5 & 6 Geo. V. c. 89, s. 19; 6 & 7 Geo. V, c. 24, s. 23; 8 & 9 Geo. V. c. 15, s. 4; 11 & 12 Geo. V. c. 32, s. 16.

[6] 9 & 10 Geo. V. c. 32, s. 8 and Schedule II.

[7] 1 Edw. VII. c. 7, s. 2; 8 Edw. VII. c. 16, Schedule; 8 & 9 Geo. V. c. 15, s. 8 and Schedule III. Pt. I.

[8] 3 Edw. VII. c. 21, s. 1 (1).

[9] 39 & 40 Vict. c. 36, s. 95.

[10] 3 Edw. VII. c. 46, s. 3.

composed partly of sugar, the rates being fixed by regulations on the basis of the amount of sugar used in the manufacture of such goods. Confectionery, certain fruits preserved in syrup, and condensed milk (sweetened) are among the many articles included in this group.[1] Reduced rates of duty are charged upon products of the British Empire.[2]

(xvi) *Tea.*

901. Imported tea is liable to Customs duty,[3] the rate of which is fixed annually by statute, the present rate, which continues in force to 1st August 1927, being 4d. per pound.[4] Preferential duties on Empire products are charged upon the import of tea.[5]

(xvii) *Tobacco.*

902. Classified either as (*a*) unmanufactured and stripped or unstripped, or (*b*) manufactured (*e.g.* cigars, cigarettes, Cavendish or Negro Head or other tobaccos and snuff), tobacco is subject to Customs duties varying according to the description of the particular goods and to the amount of moisture per 100 lb. present in unmanufactured tobaccos and snuff.[6] A preference by way of reduction of Customs duties is made in the case of products of the British Empire.[7] The importation of tobacco must be made only through certain ports approved by the Commissioners. In Scotland these ports are Aberdeen, Glasgow, Grangemouth, Granton, Greenock, and Leith. Unless under special license no ship of less than 120 tons' registered tonnage can be used for the importation of tobacco.[8] Packages containing tobacco must contain nothing else and must weigh not less than 80 lb. each.[9] Imported tobacco, on payment of duty, may be cleared and dispatched for home consumption or may be placed in an approved warehouse. Cavendish or Negro Head tobacco, however, must be warehoused on importation.[10] The duty payable upon tobacco cleared and delivered for home use is charged upon the accounts thereof taken on delivery from the warehouse, or, in the option of the importer, the account taken on the landing of the tobacco.[11]

(xviii) *Wine.*

903. This is liable to a duty according to the number of degrees of proof spirit per gallon.[12] An additional duty is charged on wine imported in bottle. Ports approved by the Commissioners for the import

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[1] 1 Edw. VII. c. 7, s. 7 (1).
[2] 15 & 16 Geo. V. c. 36, s. 8 (1) and Schedule III. Pt. I.
[3] 5 & 6 Geo. V. c. 89.
[4] 16 & 17 Geo. V. c. 22, s. 1.
[5] 9 & 10 Geo. V. c. 32, s. 8 and Schedule II.
[6] 10 Edw. VII. c. 8, s. 83 and Schedule; 8 & 9 Geo. V. c. 15.
[7] 15 & 16 Geo. V. c. 36, Schedule III.
[8] 39 & 40 Vict. c. 36, ss. 42, 171.
[9] 59 & 60 Vict. c. 28, s. 5 (2).
[10] 39 & 40 Vict. c. 36, s. 42.
[11] *Ibid.*, s. 98.
[12] 62 & 63 Vict. c. 9, s. 2; 10 & 11 Geo. V. c. 18, s. 7; 11 & 12 Geo. V. c. 32, s. 3.

of wine [1] include Aberdeen, Dundee, Glasgow, Grangemouth, Greenock, and Leith. On payment of duty, wine, upon being landed, may be delivered for home use or may be placed in a duty-free warehouse.[2] Wine while in warehouse may be bottled or mixed and fortified with any wine spirits (not being British flavoured or compounded spirits) to an extent not exceeding the proportion of 10 gallons of spirits to 100 gallons of wine, provided that when so mixed or fortified it shall not be raised to a greater degree of strength than 40 per cent. of proof spirit.[3] The duty upon wine delivered from a warehouse for home consumption is calculated upon the account thereon taken on delivery.[4] A reduction of duty is allowed upon wine produced in the British Empire.[5]

(xix) *Wrapping Paper.*

904. The Finance Act of 1926 provided that, for a period of five years from 1st May 1926, a Customs duty at the rate of $16\frac{2}{3}$ per cent. of the value of packing or wrapping paper of certain weights and descriptions should be charged upon their importation.[6]

Section 8.—Offences under the Revenue Acts.

905. Offences under these Acts are very numerous, and they, with their appropriate penalties, are set forth in the Customs Consolidation Act of 1876 and subsequent and amending statutes. Of these offences the most important is smuggling.

Subsection (1).—*Smuggling.*

906. Smuggling is the offence of making, importing, or exporting goods without paying Government duties, and with the intention of defrauding the Revenue. If smuggled goods are sold in this country, no action lies for recovery of the price, provided that the seller knew that the goods sold had been smuggled. A foreign seller may recover the price of goods sold by him and smuggled into this country if he has not been accessory to the smuggling.

907. The Act of 1876 contains various provisions dealing with smuggling offences. Vessels made use of in removal of uncustomed or prohibited goods shall be forfeited, and the owners and masters of such vessels shall each be liable in a penalty equal to the value of such vessel or boat, not in any case exceeding £500 (s. 172). Goods unshipped without payment of duty and prohibited goods, goods illegally removed from warehouses without payment of duty, prohibited goods shipped or water-borne with intent to be exported, goods subject to duty concealed on board ship, and also goods used to conceal them, are all liable to

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[1] 39 & 40 Vict. c. 36, s. 42. [2] *Ibid.*, s. 77. [3] *Ibid.*, s. 95. [4] *Ibid.*, s. 98.
[5] 9 & 10 Geo. V. c. 32, s. 8 and Schedule II.; 10 & 11 Geo. V. c. 18, s. 7 (2); 11 & 12 Geo. V. c. 32, s. 3 (3).
[6] 16 & 17 Geo. V. c. 22, s. 11 (1).

forfeiture (s. 177). Any vessel or boat arriving within the United Kingdom or the Channel Islands, or within three leagues thereof, having prohibited goods on board or attached thereto, is liable to forfeiture along with the contraband goods carried, and persons found to have been on board vessels with contraband goods may be detained and taken before any justice (s. 179). Ships belonging to His Majesty's subjects from which, during a chase by a Revenue boat, goods are thrown overboard, are liable to forfeiture (s. 180).

908. Ships not bringing-to when required to by a Revenue boat or by one of His Majesty's ships are liable to a penalty of £20, and also to be fired into (s. 181). Ships and persons may be searched in port by officers of Customs, but any person before being searched may require to be taken before a justice or superior officer of Customs (ss. 182–185). Every person guilty of illegally importing, unshipping, removing from quay or wharf, carrying into or removing from warehouse without authority, harbouring or concealing, carrying or removing contraband goods, or who in any other way shall be guilty of fraudulent evasion of any duties of Customs, shall, for each such offence, forfeit either treble the value of the goods, including the duty payable thereon, or £100 at the election of the Commissioners of Customs; and the offender may either be detained or proceeded against by summons (s. 186). Every person who shall rescue or attempt to rescue goods seized by officers of Customs, or persons apprehended for a Revenue offence, or who shall assault, obstruct, or resist Revenue officers in the execution of their duties, shall, for each such offence, forfeit a penalty of £100 (s. 187). Persons to the number of three or more assembling to run goods are liable to a penalty not exceeding £500 and not less than £100 (s. 188). Procuring or hiring persons to run goods is an offence punishable with imprisonment for any term not exceeding twelve months. Committing Revenue offences armed and disguised, or being armed and disguised with contraband goods within five miles of the sea coast or any tidal river, entails a liability to imprisonment, with or without hard labour, for any term not exceeding three years (s. 189). Persons signalling smuggling vessels may be detained and forfeit £100, or be kept to hard labour for one year (s. 190). Persons shooting at boats belonging to the Navy or Revenue Service are guilty of felony (s. 193). Persons cutting adrift vessels belonging to the Customs shall, for every such offence, forfeit the sum of £10 (s. 195).

909. The course of procedure for recovering penalties, enforcing forfeitures, and punishing offenders under the Customs Acts is prescribed by ss. 218–245 and 247–263 of the statute. By the Customs and Inland Revenue Act, 1879,[1] it is provided that persons who have been previously convicted of any offence against the Customs Acts and who have been adjudged to pay a penalty of £100 or upwards may, on subsequent conviction, be sentenced to imprisonment, with or without hard labour.

910. By the Customs and Inland Revenue Act, 1881,[2] it is provided

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[1] 42 & 43 Vict. c. 21, s. 12.

[2] 44 Vict. c. 12, s. 12.

that any officer of Customs or other person duly employed in the prevention of smuggling may search any person on board any ship or boat within the limits of any port in the United Kingdom or the Channel Islands, or any person who shall have landed from any ship or boat, provided such officer or other person duly employed as aforesaid shall have good reason to suppose that such person is carrying or has any uncustomed or prohibited goods about his person.

A person shall be guilty of an offence—

1. If he staves, breaks, or destroys any goods to prevent the seizure thereof by an officer of Customs or other persons authorised to seize the same.

2. If he rescues, or staves, breaks, or destroys, to prevent the securing thereof, any goods seized by an officer of Customs or other person authorised to seize the same.

3. If he rescues any person apprehended for any offence punishable by fine or imprisonment under the Customs Acts.

4. If he prevents the apprehension of any such person.

5. If he assaults or obstructs any officer of Customs, or any officer of the Army, Navy, Marines, Coastguard, or other person duly employed for the prevention of smuggling, going, remaining, or returning from on board a ship or boat within the limits of any port in the United Kingdom or the Channel Islands, or in searching such a ship or boat, or in searching a person who has landed from any such ship or boat, or in seizing any goods liable to forfeiture under the Customs Acts, or otherwise acting in the execution of his duty.

6. If he attempts or endeavours to commit, or aids, abets, or assists in the commission of any of the offences mentioned in this section.

And a person so offending shall for each such offence forfeit the penalty of not exceeding £100, and he may either be detained or proceeded against by information or summons.

Subsection (2).—*Legal Proceedings.*

911. All duties, penalties, and forfeitures incurred under or imposed by the Customs Acts, and liability to forfeiture of any goods seized under the authority thereof, may be sued for, prosecuted, determined, and recovered by action of debt, information, or other appropriate proceeding in the Superior Courts of Common Law at Edinburgh (*i.e.* the Court of Session) in the name of the Lord Advocate, or of some officer of Customs and Excise, or by information in the name of some officer of Customs and Excise, before one or more justice or justices.[1] Prior to 1856 the Court of Exchequer was the Revenue Court of the Crown in Scotland, and took cognisance of all questions of Customs and Excise. By the Court of Exchequer Act, 1856,[2] the Exchequer was abolished as a separate Court, and its jurisdiction and functions were transferred to the Court of

[1] 42 & 43 Vict. c. 21, s. 11. [2] 19 & 20 Vict. c. 56.

Session. See EXCHEQUER. Proceedings under the Customs Acts are competent in the Sheriff Court under the Summary Jurisdiction (Scotland) Act, 1908.[1] All proceedings under the Customs and Revenue Acts must be commenced within three years next after the date of the offence committed.[2]

SUBSECTION (3).—*Jurisdiction.*

912. Where any offence is committed in any place upon the water, not being within any county of the United Kingdom, or when Customs officers have any doubt whether such place is within the boundaries or limits of any such county, such offence shall, for the purposes of the Customs Acts, be deemed and taken to be an offence committed upon the high seas; and for the purpose of giving jurisdiction under such Acts, every offence shall be deemed to have been committed, and every cause of complaint to have arisen either in the place in which the same actually was committed or arose, or in any place on land where the offender or person complained of may be or be brought.[3]

913. When persons are brought before a justice of the peace for an offence against the Customs Acts, where summary procedure is incompetent, they, by his order, may be detained for a reasonable time in order to obtain the order of the Commissioners of Customs;[4] and where the attendance of any justice of the peace having jurisdiction in the county where the offence is committed cannot be conveniently obtained, any magistrate of any adjoining county to that in which the offence was deemed to have been committed may hear and determine any information exhibited to him with regard to the offence.[5]

SECTION 9.—FURTHER DUTIES AND POWERS OF THE CUSTOMS AUTHORITIES.

914. Recent legislation has enlarged the scope of the powers, duties, and authority of the Commissioners of Customs and Excise. Among the Acts which have conferred these additional powers are the following: Air Navigation Act, 1920;[6] Anglo-Portuguese Commercial Treaty Acts, 1914[7] and 1916;[8] Anthrax Prevention Act, 1919;[9] Butter and Margarine Act, 1907;[10] Consular Salaries and Fees Act, 1891;[11] Copyright Act, 1911;[12] Dangerous Drugs Act, 1920;[13] Diseases of Animals Act, 1894;[14] Emergency Powers Act, 1920;[15] Explosives Act, 1875;[16] Finance Acts, 1907[17] and 1908;[18] Foreign Enlistment Act, 1870;[19] German

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[1] 8 Edw. VII. c. 65, s. 11.
[2] 39 & 40 Vict. c. 36, s. 257.
[3] *Ibid.*, s. 229.
[4] *Ibid.*, s. 197.
[5] *Ibid.*, s. 230.
[6] 10 & 11 Geo. V. c. 80.
[7] 5 Geo. V. c. 1.
[8] 6 & 7 Geo. V. c. 39.
[9] 9 & 10 Geo. V. c. 23.
[10] 7 Edw. VII. c. 21.
[11] 54 & 55 Vict. c. 36.
[12] 1 & 2 Geo. V. c. 46.
[13] 10 & 11 Geo. V. c. 46.
[14] 57 & 58 Vict. c. 57.
[15] 10 & 11 Geo. V. c. 55.
[16] 38 Vict. c. 17.
[17] 7 Edw. VII. c. 13.
[18] 8 Edw. VII. c. 16.
[19] 33 & 34 Vict. c. 90.

Reparation (Recovery) Act, 1921;[1] Gold and Silver (Export Control, &c.) Act, 1920;[2] Hall-marking of Foreign Plate Act, 1904;[3] Importation of Plumage (Prohibition) Act, 1921;[4] Mail Ships Act, 1891;[5] Margarine Act, 1887:[6] Merchandise Marks Acts, 1887[7] and 1911;[8] Merchant Shipping Act, 1894;[9] Motor Car (International Circulation) Act, 1909;[10] Naval Prize Act, 1864;[11] Pilotage Act, 1913;[12] Post Office Act, 1908;[13] Post Office (Parcels) Act, 1882;[14] Public Health (Regulations as to Food) Act, 1907;[15] Sale of Food and Drugs Acts, 1875[16] and 1899;[17] Salmon Acts (Amendment) Act, 1863;[18] Salmon Fishery Act, 1865;[19] Trawling in Prohibited Areas Prevention Act, 1909.[20]

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[1] 11 Geo. V. c. 5.
[2] 10 & 11 Geo. V. c. 70.
[3] 4 Edw. VII. c. 6.
[4] 11 & 12 Geo. V. c. 16.
[5] 54 & 55 Vict. c. 31.
[6] 50 & 51 Vict. c. 29.
[7] 50 & 51 Vict. c. 28.
[8] 1 & 2 Geo. V. c. 31.
[9] 57 & 58 Vict. c. 60.
[10] 9 Edw. VII. c. 37.
[11] 27 & 28 Vict. c. 25.
[12] 2 & 3 Geo. V. c. 31.
[13] 8 Edw. VII. c. 48.
[14] 45 & 46 Vict. c. 74.
[15] 7 Edw. VII. c. 32.
[16] 38 & 39 Vict. c. 63.
[17] 62 & 63 Vict. c. 51.
[18] 26 & 27 Vict. c. 10.
[19] 29 & 30 Vict. c. 121.
[20] 9 Edw. VII. c. 8.

CY PRÈS.

See CHARITABLE TRUSTS.

DAILY COUNCIL.

See COURT OF SESSION.

DAIRIES, COWSHEDS, AND MILK SHOPS.

See PUBLIC HEALTH.

DAMAGES, MEASURE OF.

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Section 1.—Introductory.

915. Damages are the pecuniary satisfaction due by a party who has committed a breach of obligation to the party towards whom the obligation existed. Damages are awarded on the theory that they put the pursuer in the same position as he would have been in had the obligation of whose breach he complains been fulfilled. The remedy is equally available in breach of contract and in delict; and although there may be alternative remedies, it may be said generally that a claim of damages is competent in every case where there has been a legal wrong. The object of awarding damages being satisfaction to the injured party, and not punishment of the defender (neglecting for the moment those cases in which the conduct of the defender is a ground

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General Authorities.—Mayne on Damages, 9th ed.; Carver on Carriage by Sea, 7th ed., cap. xx.; Pollock on Torts, 12th ed.; Salmond on Torts, 6th ed.; Glegg on Reparation, 2nd ed.; Beven on Negligence, 4th ed.; Pollock on Contract, 9th ed.; Gloag on Contract.

of aggravation), the view of the law is directed to the position of the pursuer and not to that of the defender. The amount of loss the pursuer has suffered is considered in calculating the sum to be awarded; and the conduct of the defender or the profit he may make or have made by the breach of obligation are, as a rule, irrelevant to the inquiry. The means of the defender have still less to do with the case. Neither in actions for breach of promise of marriage (although the position of the defender may be proved generally in order to shew what the pursuer has lost) [1] nor in those at the instance of a husband against the seducer of his wife, will the Court allow an inquiry into the amount of the defender's income.[2]

916. The damages awarded may range from the smallest coin of the realm, when the award is intended to mark merely the invasion of a legal right without appreciable loss, to amounts which are limited only by the value of human life and the magnitude of contracts. The amount is always a jury question, but in arriving at their decision the jury are subject to certain rules of law. These may be definite enough to render the assessment of damages merely a question of calculation, or so vague as to leave the jury the widest discretion. In breach of contract, speaking generally, there are fairly definite and positive canons for regulating assessment, while in delict the rules are vague and negative.

Section 2.—General Rules in Contract and Delict.

Subsection (1).—*Damnum absque injuria.*

917. Damages being due only in respect of a wrong, it follows that none can be given where a wrong has not been the cause of the pursuer's loss, or where there is *damnum absque injuria*.[3] Under this head, in contract, falls the class of cases where the plea that there is no *jus quæsitum tertio* is sustained as a defence. Thus where a legatee loses his legacy through the negligence of a law agent employed by the testator,[4] or where a beneficiary loses money through a bad investment of trust funds in consequence of wrong advice given by the law agent of the trust to the trustees,[5] he has no action against the law agent.[6] Another example of loss without injury is found in the case of a bank refusing further advances on a cash-credit bond, and executing diligence on bills it holds, so that the pursuer is made bankrupt.[7] Further, a person

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[1] *Somerville* v. *Thomson*, 1896, 23 R. 576; *A.* v. *B.*, 1875, 12 S.L.R. 621; *Smith* v. *Woodfin*, 1857, 1 C.B. (N.S.) 660.

[2] *Keyse* v. *Keyse*, 1886, 11 P.D. 100.

[3] *Mogul Steamship Co.* v. *MacGregor, Gow & Co.*, [1892] A.C. 25.

[4] *Robertson* v. *Fleming*, 1861, 4 Macq. 167.

[5] *Raes* v. *Meek*, 1889, 16 R. (H.L.) 31.

[6] *Blumer* v. *Scott*, 1874, 1 R. 379; *Campbell* v. *Morrison*, 1891, 19 R. 282; *Tully* v. *Ingram*, 1891, 19 R. 65.

[7] *Johnston* v. *Commercial Bank of Scotland*, 1858, 20 D. 790; *Wallace* v. *Henderson*, 1867, 5 M. 270.

who has suffered *damnum* cannot recover damages if the *injuria* is suffered by another. The *damnum* and the *injuria* must be united in one person. Where the damage directly resulting from a breach of contract falls on some third person, who is neither a party nor a *tertius* under the contract, such third person has no cause of action.[1] It has, however, been held in England that *damnum absque injuria*, though not itself a cause of action, may be a sufficient ground for damages where a claim is based on some other independent cause of action.[2] In delict, on the other hand, there is said to be *damnum absque injuria* where a person by lawful operations on his own property causes damage to his neighbour, as by sinking a well which draws off the water from that of his neighbour,[3] or where an upper proprietor throws flood-water on the land of a lower through the erection of an embankment involving no risk of damage except from some extraordinary cause,[4] or where the act complained of is done in virtue of statutory powers, imperative and not permissive only in character, in the reasonable exercise of these powers and not in excess of them.[5]

Subsection (2).—*Injuria absque damno.*

918. Where there is *injuria absque damno*, the exact converse of the above does not hold good. A legal wrong always carries with it a right to some damages,[6] but where no distinct loss can be shewn, the damages will be only nominal. Thus in contract mere delay in fulfilment, as in failing timeously to deliver goods bought, will not, where there has been no serious inconvenience, found a claim for substantial damages. But a contract cannot be broken even in respect of time without the party aggrieved being entitled to claim nominal damages.[7] Similarly in delict an invasion of a person's legal rights will *ipso facto* be a good ground of action, and whether actual damage has in fact been sustained can only be determined after inquiry.[8] A pursuer was held to have stated a relevant case where he alleged that he had occupied under a lease, which he had renounced some time prior to the date of raising his action, a portion of a mineral field which he never wrought, and that during his tenancy a large quantity of minerals had been secretly abstracted by the defenders, who were tenants of an adjoining

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[1] *Earl* v. *Lubbock*, [1905] 1 K.B. 253. Cf. *Cavalier* v. *Pope*, [1906] A.C. 428; *Anglo-Algerian Steamship Co.* v. *The Houlder Line*, [1908] 1 K.B. 659; *Peek* v. *Gurney*, 1873, L.R. 6 H.L. 377.

[2] *Griffith* v. *Richard Clay & Sons*, [1912] 2 Ch. 291.

[3] *Chasemore* v. *Richards*, 1859, 7 H.L.C. 349; but, *e contra*, see *Mayor of Bradford* v. *Pickles*, [1895] A.C. 587, per Lord Watson at p. 597; *Blair* v. *Finlay*, 1870, 9 M. 204.

[4] *Filshill* v. *Campbell*, 1887, 14 R. 592; *Murdoch* v. *Wallace*, 1881, 8 R. 855.

[5] *Mersey Docks and Harbour Commrs.* v. *Gibbs*, 1866, L.R. 1 H.L. 93, at p. 112; *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186; *Vaughan* v. *Taff Vale Rly. Co.*, 1860, 5 H. & N. 679; *Port-Glasgow and Newark Sailcloth Co.* v. *Caledonian Rly. Co.*, 1893, 20 R. (H.L.) 35; *Jones* v. *Festiniog Rly. Co.*, 1868, L.R. 3 Q.B. 733.

[6] *The* "*Mediana*," [1900] A.C. 113.

[7] *Webster* v. *Cramond Iron Co.*, 1875, 2 R. 752.

[8] *Cassidy* v. *Connochie*, 1907 S.C. 1112.

coal-working, although he did not shew how he had sustained any actual damage. But if an act complained of as negligent has caused no loss to the pursuer, no damages will be awarded, because loss is of the essence of an action laid on negligence.[1] And in cases of wrongful interdict damages cannot be recovered if none have been suffered.[2] "Damages are not given for the mere pronouncement of interdict, but for the being stopped from doing the thing that they might do." [3]

Subsection (3).—*Remoteness of Damage.*

919. The law limits the ambit within which the consequences of a wrongful act are recognised as flowing from it; and where an injury is only remotely connected with the alleged cause an action will not lie. This rule is equally applicable whether damages are claimed for breach of contract or delict.[4] "The first, and in fact the only inquiry in all cases is, whether the damage complained of is the natural and reasonable result of the defendant's act; it will assume this character if it can be shewn to be such a consequence as in the ordinary course of things would flow from the act." [5] The law, as here stated, has been carried further in what is known as the *Thrasyvoulos* case [6]:—"Given the breach of duty which constitutes negligence and given the damage as a direct result of that negligence, the anticipations of a person whose negligent act has produced the damage appear to me to be irrelevant." But intended damages can never be too remote; [7] and while the rule as to remoteness applies to damages arising out of breach of contract equally with damages arising out of delict, the question of remoteness has to be construed in reference to the contract and the matters within the knowledge and contemplation of the parties at the time the contract was entered into.[8]

920. It is the direct which the law regards as the real cause; and where the defender's act is one cause, but other occurrences have conjoined with it to produce the result, some of these may be regarded as severing the causal connection between the defender's act and the result complained of, and as being the proximate or true cause. For instance, it was held that a breach of contract in supplying late instead of early cabbage-seed, which should have been noticed by the pursuer long before the plants raised from the seed were ready for sale, would

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[1] *Millar's Trs.* v. *Polson*, 1897, 24 R. 1038; cf. *Irving* v. *Burns*, 1915 S.C. 260; and *Randall, Ltd.* v. *Summers*, 1919 S.C. 396.

[2] *Aird* v. *Tarbert School Board*, 1907 S.C. 305; cf. *Bostock* v. *Ramsey Urban Council*, [1900] 2 Q.B. 616.

[3] *Clippens Oil Co.* v. *Edinburgh and District Water Trs.*, 1906, 8 F. 731; *Bell* v. *Simpson*, 1867, 5 M. 298.

[4] *Cobb* v. *Great Western Rly. Co.*, [1893] 1 Q.B. 459; [1894] A.C. 410. Cf. *Reavis* v. *Clan Line Steamers*, 1926 S.C. 215.

[5] *The "Notting Hill,"* 1884, 9 P.D. 113, per Brett M.R.

[6] *In re Polemis and Furness, Withy & Co.*, [1921] 3 K.B. 560, per Bankes L.J. at p. 572.

[7] *Quinn* v. *Leathem*, [1901] A.C. 495, per Lindley L.J. at p. 537.

[8] *Hadley* v. *Baxendale*, 1854, 9 Ex. 341.

not support a claim of damages on account of (1) claims for damages by the purchasers of the plants; (2) loss of business arising from disappointment of customers, leading them to give up dealing with the pursuer. The proximate cause of the pursuer's loss was his own failure to notice that the plants which he sold to his customers were late cabbages instead of early plants, and that was not a natural consequence of the defender's breach of contract.[1] Where, also, wrong turnip-seed was supplied to the pursuer, and in consequence the turnips were destroyed by frost, the pursuer was found not entitled to damages for loss sustained on account of not having sound turnips to fatten cattle.[2] The rule was also applied in a case where, the defenders having failed to pay charges for repair of their ship, the repairers detained it on their slip in security of the account, and afterwards sued for damages in respect of their slip being occupied by the vessel, and their trade in repairing vessels being thus interfered with. It was said that, as a general rule, consequential damages are not due for inconvenience or loss arising in consequence of non-payment of a debt, and that a tradesman or manufacturer, retaining for his own security the goods and property of his employer, is not entitled to make profit or stock in trade of that transaction.[3]

921. In the above cases the reason for holding the pursuer disentitled to damages was that some action or inaction of his own had prevented the defender's breach of obligation from being the proximate cause of the loss; but the rule as to remoteness is also applicable where the pursuer, without any failure of duty on his part, has suffered damage, if the damage is only indirectly connected with the breach complained of. In a leading case where the female plaintiff had been carried to a wrong railway station in breach of contract by a railway company, and, being unable to find accommodation, was compelled to walk five miles in the rain at night, in consequence of which she caught cold and was laid up and unable for some time to attend to her business or family, Cockburn C.J. said that, in order to recover: "You must have something flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of. In this case the wife's cold and its consequences cannot stand upon the same footing as the personal inconvenience arising from the additional distance which the plaintiffs had to go" (for which damages were given). "It is an effect of the breach of contract in a certain sense, but removed one stage; it is not the primary but the secondary consequence, . . . it is not the necessary consequence, it is not even the probable consequence of a person being put down at an improper place

[1] *Wilson* v. *Carmichael*, 1894, 21 R. 732.

[2] *Taylor* v. *Sharp*, 1868, 6 S.L.R. 95.

[3] *Stephen* v. *Swayne & Bovill*, 1861, 24 D. 158, at p. 162; cf. *Anglo-Algerian Steamship Co.* v. *Houlder Line*, [1908] 1 K.B. 659.

and having to walk home." [1] The mere breach of contract does not involve anything but nominal damages where the inconvenience caused is only a matter of vexation and annoyance which cannot be assessed at a money value or put in tangible and practical form.[2]

922. But damage, though remote in the sense of not being immediately connected in time and place with the cause of loss, may be recovered if it appears that there is a true causal connection with the defender's act.[3] The defender was held liable where the breach of contract was taking a hired riding horse off the road and galloping it in a field, and the consequences were that it split its pastern bone; was laid up for six weeks; being deprived of exercise, took inflammation of the bowels; and being, on account of its condition, a bad patient, died.[4] In another case, a fall, which dislocated the plaintiff's shoulder, was found to be the cause of his death from pneumonia, as his catching cold and the fatal effects of the cold were both due to the condition of health to which he was reduced by the accident.[5]

923. Damage is further made too remote by the *actus interveniens* of the pursuer not only when his act amounts to contributory negligence, but also when it is a voluntary act by which he intentionally brings that damage on himself.[6]

924. In actions founded on delict or negligence the rule as to consequential damage, though stated in the same terms,[7] is applied in a way less favourable to the defender than in the case of contract. A person who has been negligent is in general liable for all the damage to which his negligent act has contributed. While a breach of contract which would not have produced injurious consequences of itself does not imply liability, a delict, though it becomes operative only through the accompanying negligence of someone else, may render the person originally in fault liable. But if the injurious occurrence is not one which the negligent person ought to have foreseen, he will not be held responsible.[8] Consequently, a person who negligently injures the servant of another is not liable to his master in damages for the loss of his service; [9] nor is one who, by stopping up a public footway on his own land, causes members of the public to trespass on his neighbour's, responsible for the damage done by the trespassers; [10] nor a railway

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[1] *Hobbs* v. *London and South-Western Rly. Co.*, 1875, L.R. 10 Q.B. 111; commented on, *M'Mahon* v. *Field*, 1881, 7 Q.B.D. 591.

[2] *Hamlin* v. *Great Northern Rly. Co.*, 1856, 1 H. & N. 408; *Addis* v. *Gramophone Co.*, [1909] A.C. 488.

[3] *Mowbray* v. *Merryweather*, [1895] 2 Q.B. 640.

[4] *Seton* v. *Paterson*, 1880, 8 R. 236; *M'Mahon* v. *Field*, 1881, 7 Q.B.D. 591; *Halestrap* v. *Gregory*, [1895] 1 Q.B. 561.

[5] *Isitt* v. *Railway Passengers Assurance Co.*, 1889, 22 Q.B.D. 504.

[6] *Admiralty Commrs.* v. *S.S.* "*Amerika*," [1917] A.C. 39; *S.S.* "*San Onofre*" v. *S.S.* "*Melanie*," [1922] P. 243.

[7] *Allan* v. *Barclay*, 1864, 2 M. 873.

[8] *Sharp* v. *Powell*, 1872, L.R. 7 C.P. 253, at p. 258.

[9] *Allan* v. *Barclay*, 1864, 2 M. 873.

[10] *Blagrave* v. *Bristol Waterworks Co.*, 1856, 1 H. & N. 369; cf. *Scholes* v. *North London Rly. Co.*, 1870, 21 L.T. (N.S.) 835.

company which negligently allows its carriages to be overcrowded, for an assault and robbery committed on a passenger.[1] But where the acts of an intermediary are the natural consequence of the defender's act the law does not consider the connection between the defender's act and the pursuer's injury to have been severed.

925. It has often been urged that the intervention of a third person's act, or of some independent human agency, prevents the application of the rule of proximate cause, and makes the further results and damages remote; "but that general proposition is clearly unsound since as far back as *Scott* v. *Shepherd*." [2] In that case a person who threw a lighted squib into a crowd, where it was thrown about by different people in self-protection, was held liable in damages to a person who was ultimately injured by it.[3] And where a person, advertised to make a parachute descent in a certain place, came down in an adjacent field and was the means of collecting a crowd who damaged the crop, there was held to be a relevant case in respect of injury to crop.[4]

926. Where the proximate cause of the damage complained of is the malicious act of a third party, the defender is not liable in an action grounded on negligence unless it can be shewn that he ought to have anticipated the likelihood of such a malicious act so that it becomes his duty to take precautions against it. Thus damages due to overflow of water from a lavatory have been held too remote as against a defender, being due to the malicious act of a third party which the defender had no duty to anticipate.[5]

927. Where the pursuer has been injured by the act of the defender without the intervention of a third party the result may still be so remote as not to be actionable. A trustee who suffered from a heart complaint was held not entitled to damages against his co-trustees, who, by their irritating and unwarrantable conduct of the trust affairs, aggravated his complaint and rendered him unfit for business; [6] and a railway passenger who was illegally, but without unnecessary violence, removed from a carriage, failed to recover damages for the loss of a pair of race-glasses which he left behind on being removed.[7] A somewhat different application of the doctrine of remoteness has been held to exclude recovery for personal injury from nervous shock where there has been no physical impact.[8] But in a subsequent Irish case, differing from the case last cited only in the fact that there had been some physical shock, though no apparent physical injury, the Court refused

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[1] *Pounder* v. *North-Eastern Rly. Co.*, [1892] 1 Q.B. 385; *Cobb* v. *Great Western Rly. Co.*, [1893] 1 Q.B. 459; [1894] A.C. 419 (*Pounder* v. *North-Eastern Rly. Co.*, *supra*, commented on).

[2] *Don Benito* v. *H.M.S.* "*London*," [1914] P. 72, per Sir Samuel Evans at p. 80.

[3] *Scott* v. *Shepherd*, 1773, Smith's Leading Cases, 12th ed., i. 513; *Clark* v. *Chambers*, 1878, 3 Q.B.D. 327; *Robertson* v. *Connolly*, 1851, 13 D. 779.

[4] *Scott's Trs.* v. *Moss*, 1889, 17 R. 32.

[5] *Rickards* v. *Lothian*, [1913] A.C. 263.

[6] *Pridie* v. *Dick*, 1857, 19 D. 287.

[7] *Glover* v. *London and South-Western Rly. Co.*, 1867, L.R. 3 Q.B. 25; *Cobb* v. *Great Western Rly. Co.*, *supra*.

[8] *Victorian Rly. Commrs.* v. *Coultas*, 1888, 13 App. Cas. 222.

to follow it,[1] a course taken since by both Scottish[2] and English[3] Courts. In the Court of Session it has been held in the Outer House that where a lodger committed suicide in his lodgings there was a relevant claim for damages by his landlady and her daughters against his representatives.[4]

928. The question of remoteness of damage is said, in England, to be for the judge to decide, and not for the jury;[5] but there seems to be no Scottish authority or dictum expressly dealing with the point. As a question of law it ought properly to belong to the judge, who should give a direction to the jury; and though the opinions and the form of issue in the case of the parachute descent, mentioned above, seem to treat the point as a question of fact for the jury,[6] there can be no doubt that the Court must first be satisfied that there is a reasonable case.

929. Lapse of time between an act and damage will not by itself constitute remoteness, but may render the pursuer's proof difficult, as subsequent events may have to be excluded as causes of the damage.[7]

Subsection (4).—*Breach of Money Obligations.*

930. Interest, as damages, is due when there is failure to meet a pecuniary obligation, and runs from the date on which payment has been, or could have been, demanded, if payment has been "wrongfully withheld."[8] The rule is that nothing more is allowed.[9] The rate allowed is simple interest at five per cent.[10] A modification of this rule has been introduced, however, where the party failing to pay the principal has not had the use of it for himself, and has not been in wilful default, as in the case of a trustee who has lost the trust money through mere indiscretion. In a case where trustees had paid away the funds to the beneficiaries when it turned out that there was not a sufficient sum left to pay a creditor, and the trustees were held personally responsible, Lord Pres. Robertson said: "As regards interest, the pursuers will, if we allow only the average rate of trust interest (3 per cent.), be put in the same position as they would have occupied if the estate had been duly administered by the defenders. No profit has been made, or has been

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[1] *Bell* v. *Great Northern Rly. Co.*, 1890, 26 Ir. L.R. 428.

[2] *Cooper* v. *Caledonian Rly. Co.*, 1902, 4 F. 880; cf. *Brown* v. *John Watson, Ltd.*, 1914 S.C. (H.L.) 44, per Lord Shaw of Dunfermline at p. 50; *Brown* v. *Glasgow Corpn.*, 1922 S.C. 527.

[3] *Dulieu* v. *White*, [1901] 2 K.B. 669; *Wilkinson* v. *Downton*, [1897] 2 Q.B. 57.

[4] *A.* v. *B.'s Trs.*, 1906, 13 S.L.T. 830; cf. *Dickson* v. *St. Cuthbert's Co-operative Association*, 1922, S.L.T. 116.

[5] *Hobbs* v. *London and South-Western Rly. Co.*, 1875, L.R. 10 Q.B. 111, at p. 122; *Hammond & Co.* v. *Bussey*, 1887, 20 Q.B.D. 89.

[6] *Scott's Trs.* v. *Moss*, 1889, 17 R. 32, at p. 38.

[7] *Golder* v. *Caledonian Rly. Co.*, 1902, 5 F. 123, at p. 126.

[8] *Blair's Trs.* v. *Payne*, 1884, 12 R. 110; *Carmichael* v. *Caledonian Rly. Co.*, 1870, 8 M. (H.L.) 119, at p. 131; Bell, Com. i. 690.

[9] *Roissard* v. *Scott's Trs.*, 1897, 24 R. 861, at pp. 865–866.

[10] *Paterson* v. *Danson*, 1897, 5 S.L.T. 64; *Gluckstein* v. *Barnes*, [1900] A.C. 240, at p. 255.

sought to be made, for themselves by the trustees, and we do not consider this a case where penal interest should be required." [1] But four per cent. is a rate commonly allowed.[2] If the failure of duty on the part of the trustees has been culpable or extreme, then legal interest will be charged against them,[3] as also when they have themselves used the trust funds.[4] Interest on interest will not be given except in very special cases.[5] The return made by money wrongfully withdrawn by a lender from a business will not be considered, but the profits which it would have earned if left in the business will be considered.[6] A bank wrongfully withholding money from a depositor may be liable in substantial damages.[7]

Subsection (5).—*Interest on Damages.*

931. Interest on damages, where damages are due on grounds other than non-payment of money, is not, as a rule, given until the damages are liquidated by decree,[8] or by application of a verdict,[9] or decree after appeal.[10] But the rule is not inviolable, and in exceptional circumstances, at least in breach of contract, interest upon loss sustained prior to the date of the action may be awarded as damages. Where an iron company had contracted with shipbrokers for the carriage of a large number of sleepers at so much per ton and so many per month, and after sending certain monthly instalments had, in breach of their contract, ceased sending on sleepers, the brokers were found entitled to interest upon each monthly payment of freight from the time when it fell due. Had there been no breach of contract, the pursuers would have had the use of the money; and therefore not only the principal sums, but also interest at five per cent., being the amount of profit which the pursuers presumably lost through not having the use of the money, were given as the measure of damages.[11]

Subsection (6).—*Extinction of Claim.*

932. Besides being extinguished by explicit discharge, a claim of damages may be extinguished by implication in connection with an action; voluntary settlement; release of one co-obligant; prescription and *mora*; or waiver.

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[1] *Heritable Securities Association* v. *Miller's Trs.*, 1893, 20 R. 676.

[2] *Carruthers* v. *Carruthers*, 1896, 23 R. (H.L.) 55, at p. 59; *Baird's Trs.* v. *Duncanson*, 1892, 19 R. 1045.

[3] *Allan's Trs.* v. *Ross*, 1850, 13 D. 44; M'Laren on Wills and Succession, ii. 1216.

[4] *Davis* v. *Davis*, [1902] 2 Ch. 314.

[5] *Barclay* v. *Andrew*, [1899] 1 Ch. 674; *Blair* v. *Murray*, 1843, 5 D. 1315.

[6] *Teacher* v. *Calder*, 1898, 25 R. 661; affd. 1899, 1 F. (H.L.) 39.

[7] *King* v. *British Linen Bank*, 1899, 1 F. 928.

[8] *Martin & Sons* v. *Robertson, Ferguson & Co.*, 1872, 10 M. 949.

[9] *Flensburg S.S. Co.* v. *Seligmann*, 1871, 9 M. 1011; *Taylor* v. *MacFarlane*, 1868, 40 Sc. Jur. 332; *Lenaghan* v. *Monkland Iron Co.*, 1858, 20 D. 848.

[10] *Roger* v. *Cochrane & Co.*, 1910 S.C. 1.

[11] *Dunn & Co.* v. *Anderston Foundry Co.*, 1894, 21 R. 880; *Denholm* v. *London and Edinburgh Shipping Co.*, 1865, 3 M. 815.

(i) *Extinction by Action.*

933. A single act, amounting either to a delict or a breach of contract, cannot be made the ground of two or more actions, for the purpose of recovering damages arising within different periods but caused by the same act. On the contrary, the rule of practice, based on sound principle, is that although the delict or breach of contract is of such a nature that it will necessarily be followed by injurious consequences in the future, and though it may for this reason be impossible to ascertain with precise accuracy, at the date of the action or of the verdict, the amount of loss which will result, yet the whole damage must be recovered in one action, because there is but one cause of action. In the case in which this rule was laid down, a seller of a refrigerating machine had agreed not to sell a second within the same district for some years. Having broken his contract by selling a second, he was sued by the buyer of the first, and paid a sum in name of damages. It was held that the seller could not be sued in a second action for further damages arising subsequently to the first action out of the same breach.[1] Where also the wrong complained of as the cause of damage was working beyond the defendant's boundary and leaving an aperture in the plaintiff's coal which admitted a flow of water, and the plaintiff had recovered damages for one influx, he was held not entitled to raise another action for subsequent damage caused by the aperture (which defendant was not bound to close) remaining open and admitting a continuing flow of water.[2] A distinction has been taken, however, where the defendant's act has been lawful in itself and becomes actionable only through damage ensuing. In a case where the defendant had worked out his own coal so as to deprive his neighbour (the plaintiff) of support, it was held that recovery of damages for one subsidence did not bar a second action for a subsequent subsidence, since it was the subsidence and not the removal of the coal which was the cause of action.[3]

934. The rule is specially applicable in actions for injury to the person,[4] as in one action damages are awarded for what the pursuer has suffered and is likely to suffer.[5] Where a pursuer, after proof taken in an action for personal injuries, raised a second action concluding for a larger sum of damages, the second action was dismissed;[6] but in a motion for a new trial on the ground of excessive damages, it may be competent for the defender to shew, by producing evidence that the condition of the pursuer has materially improved since the verdict,[7]

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[1] *Stevenson* v. *Pontifex & Wood*, 1887, 15 R. 125, per Lord Pres. at p. 129; *Brunsden* v. *Humphrey*, 1884, 14 Q.B.D. 141, at p. 147.

[2] *Clegg* v. *Dearden*, 1848, 12 Q.B. 576.

[3] *Darley Main Colliery* v. *Mitchell*, 1886, 11 App. Cas. 127, at p. 133; *West Leigh Colliery Co.* v. *Tunnicliffe & Hampson, Ltd.*, [1908] A.C. 27.

[4] *Abercorn* v. *Merry & Cuninghame*, 1909 S.C. 750.

[5] *Phillips* v. *London and South-Western Rly. Co.*, 1879, 5 Q.B.D. 78, at p. 79.

[6] *Bryan* v. *Glasgow and South-Western Rly. Co.*, 1869, 6 S.L.R. 445; *Wood* v. *North British Rly. Co.*, 1891, 18 R. (H.L.) 27.

[7] *Shields* v. *North British Rly. Co.*, 1874, 2 R. 126.

that the jury have over-estimated the permanent effects of an injury. If, however, two injuries of distinctly different kinds are caused by the same wrongful act, recovery for one of them does not necessarily discharge a claim on account of the other. A blow may cause injury to the person of the plaintiff and to his watch;[1] or a collision in driving, to his carriage and his body;[2] and he may sue first for the one injury and afterwards for the other.

935. Where, however, a breach of contract or delict consists not of one act but of a series of acts, the rule is different. Thus if one contracts to deliver a certain quantity of goods during each month in the ensuing year, and fails to perform in the first or second month, that is in itself a distinct breach of contract; and if the purchaser sues for damages for that breach, he cannot in the same action claim for an apprehended breach in subsequent months, for the obligant may perform his contract for the future, and if he fails in any subsequent month that is a fresh breach of contract, for which a separate action will lie.[3] So also an operation *in suo* which creates a nuisance to one's neighbour may be followed by long-continued loss and damage to that neighbour, and yet it may not be necessary to recover the whole damage in one action; because he who commits the nuisance is under a constant legal obligation to abate it, and so long as he fails in performing that legal obligation he is every day committing a fresh nuisance.[4]

(ii) *Extinction by Voluntary Settlement.*

936. The rules governing the effect of an action in discharging claims of damages are applicable generally to agreements voluntarily come to by the parties. In particular, a discharge, unless specially restricted to particular claims, is understood to be a discharge of all claims arising out of the same subject-matter against the person in whose favour it is granted. Thus where a contract of lease was prematurely terminated by renunciation and acceptance, a claim at the instance of the landlord against the tenant, for damage sustained through diminution of rent in consequence of the premature termination of the lease, was dismissed because, on a construction of the acceptance, such a claim had not been reserved.[5] Similarly, a sum accepted in settlement of claims for personal injuries sustained through the fault of another is held to cover injury which may not have been known at the time but subsequently develops. The magnitude of such subsequently developing injury is no reason for

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[1] *Darley Main Colliery* v. *Mitchell*, 1886, 11 App. Cas. 144.

[2] *Brunsden* v. *Humphrey*, 1884, 14 Q.B.D. 141.

[3] *Stevenson* v. *Pontifex & Wood*, 1887, 15 R. 125; *Ireland* v. *Merryton Coal Co.*, 1894, 21 R. 989.

[4] *Stevenson* v. *Pontifex & Wood, supra; Shadwell* v. *Hutchinson*, 1830, 4 C. & P. 333; *Thomson* v. *Gibson*, 1841, 7 M. & W. 456.

[5] *Walker's Trs.* v. *Manson*, 1886, 13 R. 1198; *Lyons* v. *Anderson*, 1886, 13 R. 1020 (observations per Lord M'Laren on notice to be given by tenant claiming damages against landlord); *Waterson* v. *Stewart*, 1881, 9 R. 155.

reducing the settlement if it were honestly effected by the party discharged; and nothing short of fraud, or some of the other recognised grounds of reduction, will suffice.[1] But it has been said that this rule does not apply to heritable property, and that fresh damage to adjacent lands, though arising from the same cause as in the case of lands first affected and claimed for, may give a new cause of action.[2]

(iii) *Extinction by Discharge of One Co-obligant.*

937. A general discharge of a claim arising upon a breach of contract is a complete discharge not only of the parties to it, but of all other co-obligants who were responsible for the breach of contract. The rule is well settled that, unless such a discharge contains words of reservation, the benefit of the discharge will enure to all the co-obligants whether they are parties to the discharge or not. The rule is somewhat different in the case of actions upon delict; and where a party founds on a discharge which he has not himself obtained, he must shew that it is a discharge of all claims against him. Each of several wrong-doers is separately responsible for the wrong, and it is no defence to one to say that the other wrong-doers have been discharged,[3] though he may claim benefit for consideration given.[4] A discharge will not be available to one not mentioned in it unless it appears to be a discharge of the subject-matter of the action, as distinguished from mere release of a co-obligant.[5] Where a parent received a sum of money from the directors of an institution for children, in respect of the wrongful removal of her child, and granted a discharge bearing that it was in full of her whole claims for damages of every kind for the loss of her children, it was held to be a discharge to the superintendent of the institution also, although she was not mentioned in it.[6]

(iv) *Extinction by Prescription and Mora.*

938. The negative prescription of forty years extinguishes a claim of damages,[7] but, apart from prescription, delay in bringing a known claim may in certain circumstances bar a pursuer from insisting in it, and the plea of *mora* may, in most cases, avail a defender long before he would be entitled to plead prescription.[8] Damages being a debt which has only a theoretical existence until a claim is made, lapse of time, accompanied by actings which suggest that a claim is not to be made, will support a plea of *mora*.

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[1] *Wood* v. *North British Rly. Co.*, 1891, 18 R. (H.L.) 27 ; *Welsh* v. *Cousin*, 1899, 2 F. 280.
[2] *Abercorn* v. *Merry & Cuninghame*, 1909 S.C. 750.
[3] *Western Bank* v. *Bairds*, 1862, 24 D. 859, at pp. 901, 912, 921 ; *Delaney* v. *Stirling*, 1893, 20 R. 506 ; *Dillon* v. *Napier*, 1893, 30 S.L.R. 685.
[4] *Douglas* v. *Hogarth*, 1901, 4 F. 148.
[5] *Western Bank* v. *Bairds, supra*, per Lord Cowan at p. 912.
[6] *Delaney* v. *Stirling, supra.*
[7] Ersk. iii. 7, 8 ; *Young* v. *Young*, 1903, 5 F. 330.
[8] *Assets Co.* v. *Bain's Trs.*, 1904, 6 F. 676 ; 1905, 7 F. (H.L.) 104.

939. No general rule can be laid down as to what will constitute *mora*; it is always a question of circumstances; but in some cases, where breach of contract is complained of, the nature of the contract itself directs attention to special points from which the intention of a party not to raise a claim, or insist on a claim, may be inferred. In continuing contracts capable of division into separate parts—as, for example, a lease for a number of years, or a contract of sale with termly deliveries and payments—the expiry of a term is the appropriate occasion for making a claim for damage which has arisen within that term; and failure to make a claim at that time, accompanied by payment of the rent or price, raises a presumption that the claim has been departed from, or by implication discharged.[1] The further consideration that, through want of notice and lapse of time, the defender may have lost evidence which would otherwise have been available, and is unable on that account to establish the facts necessary for his defence, will, when present, be a complete bar to the pursuer.[2] Where a tenant farmer at the expiry of his lease brought an action of damages against his landlord for injury done to his crops during the last seven years of the lease, for all of which he had paid the rent, from alleged excess of game on the farm, but the receipt for the last year's rent alone contained a reservation of his claim, he was held not to be entitled to sue for the damage suffered in any year except the last.[3] The rule as to giving timeous notice of the existence of the damage and of the claim is still more applicable where a proprietor claims damages from a shooting tenant on account of an excessive stock of game.[4] Express intimation of a claim is necessary, and mere grumbling or protest on the part of a tenant who pays his rent is not sufficient to keep the claim open. Especially is this the case where the damage is from such causes as game or failure to burn heather, when the evidence is apt to be speedily lost.[5] But where the breach of contract complained of leaves permanent traces, as in the case of failure to maintain buildings, the last-mentioned consideration does not apply; and if specific notice, although oral, is given to the landlord to put them in repair, and rent is paid on the ground that that will be done, the payment of rent will not bar the pursuer's claim.[6] Nor will payment of rent bar a claim which has been specifically made in writing although the landlord has in ensuing correspondence denied liability, unless there has been a formal withdrawal of the claim.[7] But where, after a controversy has been raised, a renunciation of lease has been carried through without a reservation of the tenant's claims, he will be held to have departed from them. A renunciation being in the nature of a

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[1] *Stewart* v. *Campbell*, 1889, 16 R. 346.

[2] *Lyons* v. *Anderson*, 1886, 13 R. 1020, at p. 1025.

[3] *Broadwood* v. *Hunter*, 1855, 17 D. 340; *Baird* v. *Graham*, 1852, 14 D. 615; *Lamb* v. *Mitchell's Trs.*, 1883, 10 R. 640.

[4] *Eliott's Trs.* v. *Eliott*, 1894, 21 R. 858.

[5] *Broadwood* v. *Hunter*, *supra*; *Elmslie* v. *Young's Trs.*, 1894, 21 R. 710.

[6] *Johnstone* v. *Hughan*, 1894, 21 R. 777.

[7] *Macdonald* v. *Johnstone*, 1883, 10 R. 959.

compromise, the landlord who makes the concession of discharging the tenant from all further liability under the lease is not presumed to have done this without getting some consideration in the shape of a discharge of such claims.[1]

(v) *Extinction by Waiver.*

940. The rule that expiry of a contract, with performance of the prestations on either side, bars an unreserved claim of damages, is also exemplified in the case of master and servant. A servant is not entitled to remain in service for the full period of service and take payment of wages, and at its expiry to bring up claims of damages.[2] A railway servant who received injuries in the course of his employment, and remained in the service of the company for twenty-five years, accepting such work as they gave him, was found not entitled to raise an action for his injuries on leaving their employment;[3] and an action for damages for seduction brought by a woman, who at the time of the seduction, and for a long period thereafter, had been in the position of servant, against the representatives of the deceased master, was held to be barred by delay and remaining in the service.[4] Remaining in the service even for a few days may afford evidence of condonation, if the cause of complaint is one that would justify leaving the service, as being charged with theft.[5] But youth, isolation from friends, and other circumstances may explain continuance in the service so as to elide the plea of *mora* or condonation.[6] In the case of breach of promise of marriage also, where intimation of a claim should be made about the date of the breach, the circumstances may explain considerable delay in raising an action. A delay of eight years in taking legal proceedings after courting had ceased was held not to be a bar where the pursuer had given timeous and repeated warning that she was to insist in her claim.[7] When there has been part performance of a contract by the party claiming damages, as by payment of instalments of price without reservation, it is question of circumstances whether there has been waiver or not.[8]

941. Where there is no contract between the parties, and consequently no point of time at which more than at any other it is appropriate to make a claim for damages, evidence in support of the plea of *mora* is to be sought mainly in the length of time that has elapsed before the claim is made. A period of nearly twenty years which had elapsed since the erection of an embankment, alleged to be illegal and to be the cause of throwing flood-water on the lands of a neighbouring proprietor, was considered to be an element of importance in dismissing

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[1] *Lyons* v. *Anderson*, 1886, 13 R. 1020; *Waterson* v. *Stewart*, 1881, 9 R. 155.
[2] *Fraser* v. *Laing*, 1878, 5 R. 596, at p. 598.
[3] *Cook* v. *North British Rly. Co.*, 1872, 9 S.L.R. 315.
[4] *Maloy* v. *Macadam*, 1885, 22 S.L.R. 790.
[5] *A.* v. *B.*, 1853, 16 D. 269.
[6] *Fraser* v. *Laing*, *supra*; *M'Neill* v. *Forbes*, 1883, 10 R. 867.
[7] *Colvin* v. *Johnstone*, 1890, 18 R. 115.
[8] *Clydebank Engineering Co.* v. *Castaneda*, 1904, 7 F. (H.L.) 77.

a claim for occasional damage during those years;[1] and a longer period which elapsed between damaging operations in the construction of railway works and the raising of an action by a damnified proprietor was held to be conclusive against the pursuer.[2] Unexplained delay, even for a much shorter period, will militate against a pursuer;[3] but, on the other hand, a considerable period of delay may be held to be excusable if a good reason is established.[4]

Section 3.—Rules in Breach of Contract.

Subsection (1).—*General Rule.*

942. "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be (1) such as may fairly and reasonably be considered either arising naturally, *i.e.* according to the usual course of things, from such breach of contract itself; or (2) such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. If the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, from such a breach of contract."[5] In other words, the first alternative defines general, and the second special damage.[6]

Subsection (2).—*General Damage.*

(i) *Nominal Damages.*

943. As was noticed above, breach of contract always carries some damage, for delay and trouble in making a new contract, and the like;[7] but more than a nominal sum may be awarded without specific proof of

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[1] *Murdoch* v. *Wallace*, 1881, 8 R. 855.

[2] *North British Rly. Co.* v. *Moon*, 1879, 16 S.L.R. 265; *Barclay* v. *Great North of Scotland Rly. Co.*, 1882, 10 R. 144.

[3] *Young* v. *Young*, 1903, 5 F. 330.

[4] *Cunningham* v. *Skinner*, 1902, 4 F. 1124; *Cassidy* v. *Connochie*, 1907 S.C. 1112; *Colvin* v. *Johnstone*, 1890, 18 R. 115.

[5] *Hadley* v. *Baxendale*, 1854, 9 Ex. 341, at p. 354.

[6] Ersk. Prin., 19th ed., p. 435; Mayne on Damages, 9th ed., p. 10 *et seq.*

[7] *Webster* v. *Cramond Iron Co.*, 1875, 2 R. 754; *Teacher* v. *Calder*, 1898, 25 R. 661, at p. 672; cf. *Salvesen & Co.* v. *Rederi Aktiebolaget Nordstjernan*, 1905, 7 F. (H.L.) 101.

damage. In one case the fact that the defender had forced the pursuer into litigation by denying the breach seems to have influenced the Court in awarding a sum more than nominal.[1] Where there is no difference, however, between the contract and the market price, damages can only be nominal.[2]

(ii) *Sale.*

944. The most common illustration of damage arising naturally, or in the usual course of things, is in sale of goods, where the buyer has failed to accept or the seller has failed to deliver. In these cases the damage (now regulated by the Sale of Goods Act, 1893 [3]) is *prima facie* the difference between the contract and the market price of the goods, when there is an available market for the goods, at the date of the failure to deliver or accept, or, if no date has been fixed, then at the date of the refusal to deliver or accept.[4] A vendor may sell goods, acceptance of which is refused, and claim the difference between the contract and the realised price;[5] but if, instead of going into the market and selling at once, he keeps the goods after the date of the breach, and sells at a price less than the market price then was, he is not entitled to charge the buyer under the contract sued on with the additional loss caused by a further fall in the market.[6] A similar principle applies to the buyer. He is supposed at once to replace the goods at the current price of the day so as to minimise the loss to the seller.[7] According to the old common law, when the vendor was in breach of the contract the buyer was entitled to have the profit he would have earned on a resale considered;[8] but the English law is different, and possibly the use of the words "*prima facie*" in the Sale of Goods Act tend to approximate the Scots law to the English. Damages for loss of profit, however, are still given in Scotland.[9] It is questioned whether damages can be given for loss of trade repute.[9] In any event, nothing more than ordinary commercial profit will be allowed as general damage, although it could be clearly proved that, in the circumstances of the case, larger profits might have been made, because ordinary commercial profit represents the loss which the parties contemplate as the result of a breach of contract.[10]

945. When, in a contract of sale, continuous deliveries extending over a tract of time are provided for, the damages, where the contract

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[1] *Seaton Brick and Tile Co.* v. *Mitchell*, 1900, 2 F. 550, at pp. 554, 555.

[2] *Valpy* v. *Oakley*, 1851, 16 Q.B. 941; *Prehn* v. *Royal Bank of Liverpool*, 1870, L.R. 5 Ex., at p. 99, per Martin B.

[3] 56 & 57 Vict. c. 71, ss. 50 and 51.

[4] *Ashmore & Son* v. *Cox & Co.*, [1899] 1 Q.B. 436; *Warin and Craven* v. *Forrester*, 1876, 4 R. 190; 1877, 4 R. (H.L.) 75.

[5] *Braithwaite* v. *Foreign Hardwood Co.*, [1905] 2 K.B. 543.

[6] *Warin and Craven* v. *Forrester*, *supra.*

[7] *Duff* v. *Iron and Steel Fencing and Buildings Co.*, 1891, 19 R. 199.

[8] *Dunlop* v. *Higgins*, 1848, 6 Bell's App. 195.

[9] *Millar* v. *Bellvale Chemical Co.*, 1898, 1 F. 297.

[10] *Duff* v. *Iron and Steel Fencing and Buildings Co.*, *supra.*

is divisible into distinct periods, may require to be calculated as at different dates during its term instead of at its expiry.[1] Where a coal company contracted to supply a coal merchant with 3000 tons of coals, to be delivered over four months in about equal monthly quantities, and at the end of the period had delivered only about 1500 tons, it was held that deliveries should have been at about 750 tons per month, and that the merchant had no right to call on the company to make up in succeeding months for quantities short-delivered in earlier months, but that it was the duty of the merchant to buy in at the end of each month for the quantity short-delivered during that month; and therefore that the amount of damages was to be calculated on the basis of the market price ruling at the end of each month for the quantity short-delivered during that month.[2] Though delivery by monthly quantities is not specified, the contract may be held to be separable into monthly parts, and the rule of the above case applied.[3]

946. When a definite time is fixed for delivery, and before that time arrives intimation is given that the contract will not be fulfilled, it is the date of delivery and not the date of the repudiation that is taken.[4] "The proper period at which to calculate the damages was when the defendant ought to have received the goods. The original contract was in no way modified by the notice, and the plaintiffs were not bound then to sell in order to reduce the damages." [5] "The notice," in the words of Parke B., in the same case, "amounts to nothing until the time when the buyer ought to receive the goods, unless the seller acts on it in the meantime and rescinds the contract." [6] When no time is fixed, the date of the refusal to deliver is taken.[7]

947. When there is no available market in which the kind of goods in question can be dealt with, the rule is that the whole loss—that is, ordinary commercial loss, or, in the case of a purchaser, the profit which the purchaser would have made if he had received the article and resold it in the ordinary course of trade—is to be borne by the party in breach of contract.[8] Where iron huts, delivered in South Africa, were found to be disconform to contract and were rejected by the buyer, damages were allowed for estimated loss of profits on a resale and for expenditure in advertising and travelling expenses which were incurred in view of the contract being fulfilled and rendered unremunerative by the breach.[9] Similarly, where there was delay in delivering goods for shipment, and the purchaser had to pay additional freight and insurance in consequence, these charges were recovered. The extra freight and insurance payable represented the difference in value of the goods when delivered and when

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[1] *Roper* v. *Johnson*, 1873, L.R. 8 C.P. 167.
[2] *Ireland* v. *Merryton Coal Co.*, 1894, 21 R. 989.
[3] *Bergheim* v. *Blaenavon Iron Co.*, 1875, L.R. 10 Q.B. 319; *Roper* v. *Johnson*, *supra*.
[4] *Philpotts* v. *Evans*, 1839, 5 M. & W. 476.
[5] Per Lord Abinger C.B. in *Philpotts* v. *Evans*, *supra*.
[6] At p. 475.
[7] Sale of Goods Act, 1893, s. 51 (3).
[8] *Watt* v. *Mitchell*, 1839, 1 D. 1157.
[9] *Duff* v. *Iron and Steel Fencing and Buildings Co.*, 1891, 19 R. 199, at p. 205.

contracted to be delivered.[1] Where the seller refused to allow the buyer to cut growing timber, none similar being procurable, the damage awarded was the amount which the buyer could have realised on a resale, less the expense of preparing for the market.[2] On the other hand, where the buyer improperly refused to implement a contract for a specially manufactured article, the damages awarded to the seller were the difference between the contract price and the cost of the raw material and labour.[3] In a claim of damages against the seller of a pump which was disconform to contract, the Court, *inter alia*, allowed the buyer to recover the expenses of an unsuccessful action against a subvendee as damages directly flowing from the seller's breach.[4]

(iii) *Subject purchased for Use.*

948. When a subject is purchased not for resale but for use, damages will be estimated in view of the use for which it was intended. This will include the loss which followed from its not being supplied, or from its turning out to be defective, or, in the case of land, from its being burdened with an easement, and the profit which would have been made from the subject if it had been delivered according to the contract.[5] Thus where a ship was deficient in carrying capacity, the standard of damages was said to be the difference between the earning powers of the ship contracted for and the ship furnished;[6] and again, where a ship, intended for carrying passengers in the Australian trade, had not been timeously delivered, and freights had fallen, the difference between what she actually earned on her first voyage and what she would have earned if delivered at the contract time was taken.[7] But speculative profits will not be allowed. Where the subject of sale was land which turned out to be subject to restrictions against building, it was said that more should not be given in respect of the prevention of full enjoyment of the land than its fair value at the time of sale.[8] The loss to the purchaser is always the test, but the way of estimating it varies with the circumstances. In the case of cabbage-seed of a wrong kind being supplied, from which useless plants were raised, the unprofitable occupation of the pursuer's land and wasted labour instructed the amount;[9] and where injury to the plaintiff's horses was caused by the breaking

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[1] *Borries* v. *Hutchinson*, 1865, 18 C.B. (N.S.) 445; *Hind* v. *Liddell*, 1875, L.R. 10 Q.B. 265; cf. *Williams Bros.* v. *Agius, Ltd.*, [1914] A.C. 510, per Lord Dunedin, on the distinction between non-delivery and delayed delivery in a question of measure of damages for breach of contract for sale of goods.

[2] *M'Neill* v. *Richards*, [1899] 1 I.R. 79.

[3] *Govan Rope Co.* v. *Weir*, 1897, 24 R. 368.

[4] *Munro* v. *Bennet*, 1911 S.C. 337.

[5] Mayne on Damages, 9th ed., p. 180.

[6] *Gillespie* v. *Howden*, 1885, 12 R. 800.

[7] *Fletcher* v. *Tayleur*, 1855, 17 C.B. 21; *Collard* v. *Carswell*, 1892, 19 R. 987; 1893, 20 R. (H.L.) 47.

[8] *Louttit's Trs.* v. *Highland Rly. Co.*, 1892, 19 R. 791, at p. 800.

[9] *Wilson* v. *Carmichael & Sons*, 1894, 21 R. 732.

of a defective carriage-pole, the depreciation in the value of the horses was the damage.[1]

(iv) *Actio quanti minoris.*

949. There are only two remedies open to a purchaser for non-fulfilment of a contract of sale of personal or heritable property. He has in the first place a right to rescind the contract, conditional on his rejecting the goods or heritable property, and to claim damages proportioned to the inconvenience to which he has been put by the non-fulfilment of the contract. His other remedy is the *actio quanti minoris*, the proper application of which is to the case of a latent infirmity either in the title or the quality of the subjects sold, discovered when matters are no longer entire. At one time it was doubted whether this form of action was competent in the case of sales of moveable property, but it was never doubted that under the clause of warrandice such a right did belong to the purchaser of heritable estate, who discovered that some part of the subject of sale had not been conveyed to him. Now, however, it is quite settled that in such cases as sales of ships,[2] and fixed machinery,[3] which cannot be returned after they have been in use, if it is discovered after use that the extent or quality of the subjects sold is disconform to contract, the purchaser's remedy takes the shape of an *actio quanti minoris*. Under this action the pursuer may recover such sum as will enable him to put the subject in proper repair, or compensate him for loss of profit, where the subject is of less value than he originally bargained for. There seems to be no reason why the remedies in the cases of personal and heritable property should not be of the same kind. When a purchaser of lands or houses finds some defect in his title, or in the subjects conveyed to him, if matters are entire it is his duty to reject the subject of sale and to claim damages. But if, after buildings have been erected, or the ground sold, or outlay has been incurred, the purchaser discovers that there is a servitude affecting the property, or part of the property is carried away from him, that is a proper case for making effectual the protection secured to him under the clause of warrandice—that is to say, his remedy is the *actio quanti minoris*.[4] Where there is a breach of warranty by the seller of a corporeal moveable, the buyer may retain the goods and (*a*) set up against the seller the breach of warranty in diminution or extinction of the price; or (*b*) maintain an action against the seller for damages for the breach of warranty.[5] A buyer who has at first elected to reject is not thereby barred from retaining the article, and claiming damages.[6] An invalid partial rejection does not bar a claim of damages.[7]

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[1] *Randall* v. *Newson*, 1877, 2 Q.B.D. 102; cf. *Waters* v. *Towers*, 1853, 8 Ex. 401.

[2] *Spencer* v. *Dobie & Co.*, 1879, 7 R. 396.

[3] *Fleming & Co.* v. *Airdrie Iron Co.*, 1882, 9 R. 473; *Pearce Bros.* v. *Irons*, 1869, 7 M. 571.

[4] *Louttit's Trs.* v. *Highland Rly. Co.*, 1892, 19 R. 799–800.

[5] 56 & 57 Vict. c. 71, s. 53.

[6] *Pollock & Co.* v. *Macrae*, 1922, S.C. (H.L.) 192 at p. 201, disapproving *Electric Construction Co.* v. *Hurry & Young*, 1897, 24 R. 312; and *Croom & Arthur* v. *Stewart & Co.*, 1905, 7 F. 563.

[7] *Aitken, Campbell & Co.* v. *Boullen & Gatenby*, 1908 S.C. 490.

(v) *Contract of Carriage.*

950. In contracts for carriage of goods, besides claims for the value of goods lost or injured while in the hands of the carrier (for which see CARRIAGE BY LAND, CARRIAGE BY SEA),[1] claims also arise on account of delay in delivery. Loss of market may be a result arising naturally and directly from this breach, and consequently an item of damage. If there is a special contract to forward preferably to other traffic, or such contract is implied from the perishable nature of the goods,[2] or if, without any time being fixed for delivery, there is great delay, the carrier will be liable for such a consequence of late delivery.[3] Where pigs were sent to a carrier for delivery at a town where they were to be sold at a weekly market, and they arrived late and were sold at a loss;[4] where bales of cloth were handed to a railway company to be forwarded to Germany, and were injured on the way by the company, and had to be returned to the sender to be repacked, whereby they were delayed and lost the market in Germany;[5] where confectionery and the like perishable goods, intended to be supplied to a festivity, were not forwarded preferably, and were rejected in consequence of late arrival;[6] and where owners of a ship committed a breach of the charter-party by leaving part of a cargo of barley at the port of shipment, and the charterers had to get it carried by a later ship, so that it arrived when the price of barley had fallen,[7] damages for loss of market were recovered.

951. It was formerly considered that in the case of goods sent on a long sea voyage no such ground of damage would be allowed nor any damages occasioned by the mere fact of detention, beyond interest on the invoice price of the goods.[8] But it has since been held that, as voyages are now accomplished with almost absolute certainty, the state of the market and the reasonably calculated time of arrival may well be a vital factor present to the minds of the parties at the time of making the contract. Where in fact both parties contemplated the arrival of the ship at a particular time and intended to deal with the goods in a way which would be frustrated by delay, damages for late delivery may be calculated on the same principles whether carriage is by land or sea.[9]

952. When, on the other hand, a carrier fails or refuses to receive goods sent to him, and the sender has to forward them in a more expensive way, he is entitled to recover from the carrier the extra freight,[7] and the *onus* is on the carrier to prove that the mode of conveyance selected was more expensive than was necessary, if he takes that plea.[10]

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[1] Vol. III. pp. 1 and 26, *ante*.
[2] *Margetson* v. *Glynn*, [1892] 1 Q.B. 337.
[3] *Finlay* v. *North British Rly. Co.*, 1870, 8 M. 959, at p. 970.
[4] *Anderson* v. *North British Rly. Co.*, 1875, 2 R. 443.
[5] *Keddie, Gordon & Co.* v. *North British Rly. Co.*, 1886, 14 R. 233.
[6] *Macdonald & Co.* v. *Highland Rly. Co.*, 1873, 11 M. 614.
[7] *Dishington & Co.* v. *Gifford & Co.*, 1871, 8 S.L.R. 665.
[8] *The "Parana,"* 1877, 2 P.D. 118.
[9] *Dunn* v. *Bucknall Bros.*, [1902] 2 K.B. 614.
[10] *Connal, Cotton & Co.* v. *Fisher, Renwick & Co.*, 1883, 10 R. 824.

And if the pursuer in consequence of the non-arrival of goods requires to buy similar goods at a higher price, he is entitled to recover this extra expense.[1] If a charterer fails to supply cargo, the shipowner is entitled to the difference between the agreed-on rate and that at which he is able to re-charter the vessel,[2] and in addition to receive other items of loss fairly incurred as well as damages for inconvenience, trouble, and annoyance.[3]

(vi) *Contracts of Service.*

953. The claim of a servant wrongfully dismissed from his employment is not for the amount of the wages he would have received had he remained in the employment till the expiry of the contract period, for that would place him in a better position than if the breach of contract had not occurred, but for damages.[4] The amount of damages is calculated in view of the loss to the pursuer; and consequently there are taken into consideration, on the one hand, the privileges and perquisites of the servant's position as well as the amount of wages,[5] and, on the other, the wages the servant earns or might earn in other employment.[6] If the contract of service is brought to an end not by breach, but by dissolution, as in the case of death, the claim is not one of damages, but of compensation. In one such case the sum found due to a servant was his salary to the end of the term, under deduction of his earnings in another employment during the unexpired period;[7] in another, where a coalmaster discontinued working a pit, his manager was awarded three months' wages in place of three months' notice.[8] Damages may also be recovered where there has not been dismissal from the service, but merely failure to implement part of the contract, as failure to teach an apprentice part of his trade,[9] or to supply a domestic servant with proper board.[10] In no case can a servant's claim for mere dismissal exceed the amount of remuneration fixed by the contract; for a master is always entitled to dismiss a servant during the service, on paying the wages earned and the value of the situation up to the end of the engagement.[11] Injured feelings and the difficulty of obtaining another situation are not to be considered in assessing damages in an action laid on dismissal.[12] If dismissal is not a breach of contract, it is not made actionable by an averment that it was malicious.[13] To found an action

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[1] *Ströms Bruks Aktie Bolag* v. *Hutchison*, 1905, 7 F. (H.L.) 131.
[2] *Dunford & Elliot* v. *MacLeod & Co.*, 1902, 4 F. 912.
[3] *M'William & Sons* v. *Fletcher* (O.H.), 1905, 13 S.L.T. 455.
[4] *Cameron* v. *Fletcher*, 1872, 10 M. 301; cf. *Stewart* v. *Cochrane & Co.*, 1871, 9 S.L.R. 23.
[5] *Bentinck* v. *MacPherson*, 1869, 6 S.L.R. 376.
[6] *Ross* v. *MacFarlane*, 1894, 21 R. 396, at p. 402; cf. *Puncheon* v. *Haig's Trs.*, 1790, Mor. 13990.
[7] *Hoey* v. *M'Ewan & Auld*, 1867, 5 M. 814.
[8] *Forsyth* v. *Heathery Knowe Coal Co.*, 1880, 7 R. 887; cf. *Ross* v. *MacFarlane*, *supra*.
[9] *Lyle* v. *Service*, 1863, 2 M. 115.
[10] *Fraser* v. *Laing*, 1878, 5 R. 596.
[11] *Mollison* v. *Baillie*, 1885, 22 S.L.R. 595.
[12] *Addis* v. *Gramophone Co.*, [1909] A.C. 488.
[13] *Brown* v. *City of Edinburgh*, 1907 S.C. 256.

for breach of contract there must, of course, be a contract mutually enforceable.[1]

954. The claim of a master against his servant for deserting his employment is not calculable with reference to wages, and must always be matter of proof. A claim has been allowed for (1) loss of time, (2) inconvenience, (3) loss of business.[2] A servant deserting his employment does not forfeit his right to wages already earned, but they are subject to deduction of the amount of damage caused by his breach of contract.[3]

(vii) *Expenditure Incurred on Faith of Uncompleted Contract.*

955. Another illustration of loss arising out of breach of contract is where expenditure has been incurred by one party, after a contract has been entered into, and in expectation of its performance, which is rendered worthless by non-fulfilment by the other party when the day for performance arrives.[4] The leading example of this class of cases is the claim for patrimonial loss, in actions of breach of promise of marriage, in respect of clothes and plenishing purchased in view of matrimony. Damages have also been allowed for anticipatory expenditure where the pursuer prepared his house to receive the defenders as boarders; [5] and where an emigration society had employed a secretary and made various disbursements for shipping emigrants on a ship which the owners, in breach of charter-party, failed to supply.[6] A claim of this sort may be sustained where the expenditure has been made on the faith of a contract being completed, even although at the time it has not become and never does become binding, and where, consequently, specific implement could not be given.[7]

Subsection (3).—*Special Damage.*

(i) *When not Recoverable.*

956. Special damage, that is damage arising from circumstances peculiar to a particular case, is not recoverable unless those circumstances are known to the person who has broken the contract.[8] Where the plaintiffs, owners of a steam mill, gave a broken shaft to defendant, a carrier, to be forwarded immediately to an engineer, who was to make a new one, and the defendent delayed to forward it, the plaintiffs were not allowed to recover the loss of profits due to the mill being kept

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[1] *Mulcahy* v. *Herbert*, 1898, 25 R. 1136.
[2] *Cameron* v. *Gibb*, 1867, 3 S.L.R. 282.
[3] *Gibson* v. *M'Naughton*, 1861, 23 D. 358.
[4] *Salvesen & Co.* v. *Rederi Aktiebolaget Nordstjernan*, 1905, 7 F. (H.L.) 101, at p. 103.
[5] *Dobie* v. *Scott-Bower*, 1873, 11 M. 749.
[6] *Scottish Australian Society* v. *Borland*, 1855, 18 D. 239; cf. *Duff* v. *Iron and Steel Fencing and Buildings Co.*, 1891, 19 R. 199, at p. 205.
[7] *Walker* v. *Milne*, 1823, 2 S. 338; *Dobie* v. *Scott-Bower*, *supra*, at p. 755.
[8] *Hammond & Co.* v. *Bussey*, 1887, 20 Q.B.D. 79–88.

idle. If, however, the defendant had known that the want of the shaft would keep the whole mill idle, and that a loss of profits would be the consequence of his breach of contract, then he would have been responsible for the whole loss.[1] Where a railway company delayed delivery of a ship's casting, knowing that carriage was urgent, but not knowing the size of the ship, or that the casting formed part of the machinery of the vessel, the company was held liable only in part of the loss caused by detention of the ship, and not for loss of profits.[2] Ignorance of a subcontract under which the pursuer would earn special profit is also a case which has been decided in England to fall within the rule, and probably the same would be held in Scotland.[3] Where the plaintiffs had undertaken to supply shoes for the use of the army by a particular day, and handed them to the defendant for carriage, stating simply that they were under contract to deliver by that day, and the defendant delayed delivery, in consequence of which the shoes were not accepted, the plaintiffs were held not entitled to recover the difference between the ordinary market value of the shoes and the specially high value under the army contract, as the defendant had not been informed on that particular.[4] Where, also, a message in cipher had been handed to the defendant for delivery and was delayed through his inattention, the defendant, not knowing the nature of its contents, was held not liable for the loss on a transaction to which the message related.[5]

(ii) *When Recoverable.*

957. On the other hand, if the party in breach of contract knew of the special circumstances, he will be liable if the loss for which damages are claimed is the natural result of his breach of contract in these circumstances. On this ground, where a person supplying iron stills knew that they were to be used at the pursuers' works in distillation of oil at a very high temperature, and the stills developed flaws after being in use, and, becoming useless, threw part of the works idle, he was found liable for the loss thereby sustained.[6] Where, also, the defendant was employed by the plaintiff to make part of a machine to enable the plaintiff to deliver the whole article under a contract of which the defendant was informed, and the defendant failed timeously to supply his part, and in consequence the buyer refused to take delivery, the plaintiff was found entitled to the cost of making the machine, and also to the loss of profit he would have derived from his contract with the

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[1] *Hadley* v. *Baxendale*, 1854, 9 Ex. 341; *Gee* v. *Lancashire and Yorkshire Rly. Co.*, 1860, 6 H. & N. 211; *British Columbia Sawmill Co.* v. *Nettleship*, 1868, L.R. 3 C.P. 499; *Webster* v. *Cramond Iron Co.*, 1875, 2 R. 752, at p. 755.

[2] "*Den of Ogil*" v. *Caledonian Rly. Co.*, 1902, 5 F. 99.

[3] *Duff* v. *Iron and Steel Fencing and Buildings Co.*, 1891, 19 R. 199; cf. *Dunlop* v. *Higgins*, 1848, 6 Bell's App. 195, at p. 211.

[4] *Horne* v. *Midland Rly. Co.*, 1873, L.R. 8 C.P. 131; *Hales* v. *London and North-Western Rly. Co.*, 1863, 4 B. & S. 66.

[5] *Sanders* v. *Stuart*, 1876, 1 C.P.D. 326.

[6] *Fleming & Co.* v. *Airdrie Iron Co.*, 1882, 9 R. 473.

buyer.[1] Special damages were also recovered where the pursuer, who had chartered a tug for salvage purposes, lost a salvage contract and large profits through the late arrival of the tug.[2]

(iii) *Relief.*

958. Where the party complaining of the breach has previously been sued, and has had to pay for his breach of contract under a subcontract of which the defaulter in the original contract had notice, not only the profits he has lost under the subcontract, but also the damages he has had to pay in that action, may be recovered from the original defaulter,[3] though not damages merely claimed and not instructed against the party complaining of the breach.[4] The costs of the defence may also be recovered if the defence has been reasonable,[5] as where a vendor from whom relief is claimed has, on intimation of the action, taken up the position that the article in dispute is of the description under which it was bought and resold.[6]

SUBSECTION (4).—*Specific Implement or Damages.*

959. As a rule it is in the option of a party complaining of breach of contract to sue for specific implement or damages, and the rules that obtain in England as to specific performance do not apply here. If pursuer elect to sue for specific implement, he cannot be compelled to resort to the alternative of an action of damages, unless implement is shewn to be impossible, in which case *loco facti subit damnum interesse*,[7] or the Court, on equitable grounds, refuse the first-mentioned remedy.[8] Even when the contract itself provides an alternative remedy, as that a landlord may put premises into a state of repair under arbitration and charge the expense against his tenant, the pursuer may elect to forego the alternative remedy, if it is not specified as the only remedy, and claim damages instead.[9] And an action to have lessees ordered, after the expiry of a lease, to execute operations which should have been executed during its currency, will not be entertained.[10] It was said, in a case where the remedies were concluded for alternatively, that it was in

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[1] *Hydraulic Engineering Co.* v. *M'Haffie*, 1878, 4 Q.B.D. 670; *Elbinger Actien-Gesellschafft* v. *Armstrong*, 1874, L.R. 9 Q.B. 473; followed in *Grébert Borgnis* v. *Nugent*, 1885, 15 Q.B.D. 85.

[2] *Mackenzie* v. *Liddell*, 1883, 10 R. 705; cf. *Duke of Portland* v. *Wood's Trs.*, 1926 S.C. 640.

[3] *Grébert Borgnis* v. *Nugent, supra*; *Jones* v. *Page*, 1867, 15 L.T. (N.S.) 619.

[4] *Dorman, Long & Co.* v. *Harrower*, 1899, 1 F. 1109.

[5] *Mors-le-Blanch* v. *Wilson*, 1873, L.R. 8 C.P. 227; *Munro & Co.* v. *Bennet*, 1911 S.C. 337; *Kusler & Cohen* v. *Slawowski*, [1928] 1 K.B. 78; cf. *Fisher* v. *Val de Travers Asphalte Co.*, 1876, L.R. 1 C.P.D. 505.

[6] *Hammond & Co.* v. *Bussey*, 1887, 20 Q.B.D. 79.

[7] *Cocker* v. *Crombie*, 1893, 20 R. 954; *Gillespie & Co.* v. *Howden & Co.*, 1885, 12 R. 800.

[8] *Stewart* v. *Kennedy*, 1890, 17 R. (H.L.) 1, at p. 10.

[9] *Allan's Trs.* v. *Allan & Sons*, 1891, 19 R. 215.

[10] *Sinclair* v. *Caithness Flagstone Co.*, 1898, 25 R. 703.

the discretion of the Court to grant decree either for specific implement or damages, as the circumstances indicated to be the more appropriate.[1] It is of course clear that the Court will not order specific implement, though it is only payment of money, when the counterpart cannot be performed by pursuer. Thus an action by a servant for wrongful dismissal must be for damages and not for the amount of wages he would have earned.[2] Where a pupil who had contracted to pay by instalments for tuition by correspondence and, after receiving such tuition for a time and paying the corresponding instalments, thereafter declined to take further tuition and to pay further instalments, the Court held that the pursuers had rightly chosen to proceed for specific implement and not damages in respect that the pursuers were willing to continue the tuition.[3]

Subsection (5).—*Mitigation or Reduction of Damages.*

960. It is the duty of a person complaining of a breach of contract to take reasonable means to lessen his loss, and any loss which ordinary care on his part would have avoided cannot be recovered from the party in breach.[4] This principle has been given effect to where it was proved that the pursuer, a dismissed servant, had been offered other employment;[5] that the pursuer, complaining of delay in delivery of goods, had failed to give notice to the defender, a carrier, of the undue detention;[6] that the pursuer had obtained a profit under a new contract into which he entered after the breach complained of;[7] or had refused an advantageous offer, as in the case of a shipowner refusing an offer of cargo at another port, where there had been failure to supply cargo at the port appointed in the contract;[8] or that the pursuer's negligence in not observing that wrong goods had been supplied contributed to the loss.[9]

Subsection (6).—*Penal and Liquidate Damages.*

961. Frequently a clause is introduced into a contract for the purpose of settling the amount of damages payable in the event of a breach. Such clauses are variously expressed; but whatever the form of expression may be, there is always room for the question, whether the sum mentioned is to be treated as a penalty or as liquidate damages. If the construction of the clause establishes the former, then the party seeking

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[1] *Moore* v. *Paterson*, 1881, 9 R. 337; *Winans* v. *Mackenzie*, 1883, 10 R. 941; cf. *Dampskibsaktieselskapet Aurdal and Ors.* v. *Compania de Navegacion La Estrella*, 1916 S.C. 882, as to discretion of Court to grant decree for specific implement.

[2] *Cameron* v. *Fletcher*, 1872, 10 M. 301; *Bentinck* v. *MacPherson*, 1869, 6 S.L.R. 376.

[3] *International Correspondence Schools* v. *Irving*, 1915 S.C. 28.

[4] *Duff* v. *Iron and Steel Fencing and Buildings Co.*, 1891, 19 R. 199; *Nickoll & Knight*, v. *Ashton, Eldridge & Co.*, [1901] 2 K.B. 126.

[5] *Ross* v. *MacFarlane*, 1894, 21 R. 396; *Hoey* v. *M'Ewan & Auld*, 1867, 5 M. 814.

[6] *Dobson* v. *Edinburgh & Glasgow Rly. Co.*, 1861, 33 Sc. Jur. 443.

[7] *Mackenzie* v. *Liddell*, 1883, 10 R. 705; *Collard* v. *Carswell*, 1892, 19 R. 987.

[8] *Wilson* v. *Hicks*, 1857, 26 L.J. Ex. 242.

[9] *Wilson* v. *Carmichael*, 1894, 21 R. 732.

damages can recover, within the limit mentioned, only such damages as he proves he has suffered.[1] If the sum is held to be liquidate, the measure of damage is taken to be the amount of the sum stated, and no inquiry is made as to the loss actually suffered.[2] The theory upon which liquidate damages are awarded is, that the parties have estimated the amount of loss which will be caused by a breach of contract, that part of the bargain between them is payment of the sum mentioned,[2] and that therefore the Court by its decree is maintaining the performance of the contract according to the intention of the parties.[3] But this theory is not consistently carried out. Although damages are held to be liquidate, the Court will still inquire whether they are exorbitant and unconscionable,[4] and will not enforce a contract in which the stipulation as to damages is truly for punishment of the party in breach, since the intent of the clause ought to be only reimbursement for loss.[5] Subject to these exceptions, however, liquidate damages will be awarded as stated in the contract. In an action raised on breach of contract the proper course for a pursuer is to conclude for the stipulated sum, when it will devolve on the defender to instruct modification.[6]

962. In determining whether a sum is penal or liquidate, the use of the expressions "penal" or "liquidated" damages must be held, in view of the decisions, to be not only inconclusive but unimportant.[7] Where a sum was described as a "penalty" it was held to be liquidated damages,[8] and where the expression was "liquidated and ascertained damages, and not a penalty or a penal sum or in the nature thereof," the sum was held to be a penalty.[9] But where the language of the contract and the disclosed circumstances of the case shew that the parties intend the sum to be liquidate, especially where there appears to be nothing exorbitant or unconscionable in the stipulation, the Court will hold it to be liquidate.[10]

963. Certain rules have been laid down by the Court in this connection: (1) Stipulations regarding penal rent in contracts of lease explain themselves, and the Court has generally no difficulty, without taking any evidence or receiving any information except what appears upon the face of the contract itself, in determining whether the additional rent stipulated can be enforced as pactional or must be regarded as penal.[11] Thus where an agricultural tenant is under a prohibition as

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[1] *Forrest & Barr* v. *Henderson & Co.*, 1869, 8 M. 187; see *Castaneda* v. *Clydebank Shipbuilding Co.*, 1904, 7 F. (H.L.) 77.

[2] *Commercial Bank of Scotland* v. *Beal*, 1890, 18 R. 80.

[3] *Wallis* v. *Smith*, 1882, 21 Ch. D. 243, at p. 266.

[4] *Commercial Bank of Scotland* v. *Beal*, *supra*, at p. 84; *Webster* v. *Bosanquet*, [1912] A.C. 394.

[5] *Robertson* v. *Driver's Trs.*, 1881, 8 R. 555, at p. 562; *Forrest & Barr* v. *Henderson & Co.*, *supra*, at p. 190, note; *Craig* v. *M'Beath*, 1863, 1 M. 1020.

[6] *Craig* v. *M'Beath*, *supra*.

[7] *Forrest & Barr* v. *Henderson & Co.*, *supra*, at p. 199; *Magee* v. *Lavell*, 1874, L.R. 9 C.P. 107, at p. 115; *Elphinstone* v. *Monkland Iron Co.*, 1886, 13 R. (H.L.) 98.

[8] *Elphinstone* v. *Monkland Iron Co.*, *supra*. [9] *Kemble* v. *Farren*, 1829, 6 Bing. 141.

[10] Bell's Com. i. 699. [11] *Forrest & Barr* v. *Henderson & Co.*, *supra*.

to cropping, and contravenes it, he will he held liable in the payment stipulated for.[1] A more rigorous construction is applied where a party deliberately does what he had undertaken not to do than in the case of a person merely failing to perform what he had undertaken to do.[2] (2) Where the damages caused by the breach cannot be accurately measured the amount agreed on in the contract will be accepted by the Court.[3] For instance, where a retiring partner in a surgeon and apothecary business undertook not to practise within a certain radius, and in the event of default to pay £2000, "not in the nature of a penalty, but as ascertained liquidated damages," that amount was awarded.[4] (3) Where there is a condition for the forfeiture of a deposit in the event of a breach of a stipulation to pay a fixed sum of money, the forfeiture will be enforced and not treated as a penalty.[5] Where, in the course of negotiations for the purchase of a business, the intending purchaser deposited in bank the sum of £5000 as part payment of the purchase price of £35,000, under the stipulation that in the event of failure to pay the balance of the purchase money before a certain date the deposit should be forfeited, it was held, upon failure to pay, that the sellers were entitled, without going into any proof of damage, to enforce the forfeiture.[6] The same result follows from a clause of forfeiture, although the money may not have been actually deposited, but an equivalent, such as an I.O.U., given.[7] But forfeiture will not be ordered where there is no apparent damage, or where the party claiming forfeiture reserves his claim of damages.[8] (4) Where payment is to be in sums proportioned to the extent of the breach or breaches of obligation, parties are assumed to have adjusted them with reference to the actual amount of damage, and they are not to be regarded as penalties.[9] Examples of this class of cases occur in building [10] and mercantile contracts, where the amount of damage is estimated at a specified amount for each day or week of delay after the period for fulfilment.[11] But regard must be had to the terms of the stipulations with reference to which the damages are inserted. The Court refused to enforce a penalty where a piece of executorial work, undertaken to be done in a certain time, could not possibly be executed within it.[12]

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[1] *Miller* v. *Gwydir*, 1826, 2 W. & S. 52.

[2] *Lawson* v. *Ogilvy*, 1834, 7 W. & S. 397; *Forrest & Barr* v. *Henderson & Co.*, *supra*.

[3] *Sainter* v. *Ferguson*, 1849, 7 C.B. 716; *Webster* v. *Bosanquet*, *supra*.

[4] *Reynolds* v. *Bridge*, 1856, 6 El. & Bl. 528; *Galsworthy* v. *Strutt*, 1848, 1 Ex. 659; cf. *Curtis* v. *Sandison*, 1831, 10 S. 72.

[5] *Wallis* v. *Smith*, 1882, *supra*.

[6] *Commercial Bank of Scotland* v. *Beal*, *supra*.

[7] *Hinton* v. *Sparkes*, 1868, L.R. 3 C.P. 161, at p. 166.

[8] *Watson* v. *Noble*, 1885, 13 R. 347.

[9] *Elphinstone* v. *Monkland Iron Co.*, *supra*, at p. 106; *Craig* v. *M'Beath*, *supra*, at p. 1022.

[10] *Beattie & Son* v. *Ritchie & Co.*, 1901, 9 S.L.T. 2.

[11] *Johnston* v. *Robertson*, 1861, 23 D. 646; *De Soysa* v. *De Pless Pol*, [1912] A.C. 194; *Clydebank Engineering Co.* v. *Castaneda*, [1905] A.C. 6; cf. *Cameron Head* v. *Cameron & Co.*, 1919 S.C. 627.

[12] *Robertson* v. *Driver's Trs.*, 1881, 8 R. 555.

(5) Where a sum is mentioned generally as the amount payable on a breach of contract in a case where the contract contains several provisions of different importance, the sum is to be regarded as a penalty.[1] A general clause of damage occurring at the end of a contract which contains a special remedy for some specific breach is clearly penal.[2] But if there is only one damages clause and the contract contains several provisions, all of primary importance, the presumption in favour of penalty will be lost. (6) If the sum stipulated is manifestly extortionate, or largely in excess of the damage likely to result from the breach, it is held to be a penalty.[3] An example of this occurs where payment of a smaller sum is secured by a larger.[4] Whether the security is by way of stipulation or deposit, equity regards the security as a pledge for the debt, the object of which is fulfilled by payment of the amount of the debt.[5]

964. The sum exigible from the party in breach can in no event exceed the penalty.[6] A defender may found upon the penalty clause as restricting the amount of damages, and a pursuer is not entitled to ignore it and to prove in an action on breach of contract that his loss was greater than the sum mentioned. The judgment in the case cited has been held as establishing that in articles of roup a stated penalty is the maximum of damages which can be recovered for non-implement of an offer at a public sale.[7]

965. The words "by and attour performance," or their equivalent, usually inserted in penal clauses, are ineffective and ought to be omitted.[8] A pursuer cannot both enforce implement of a contract and claim the penalty. But, on the other hand, a party cannot by tendering the penalty escape from his obligation to implement the provision to which the penalty is adjected.[9] A tenant prohibited from keeping a public-house without permission of the landlord, "otherways to pay £10 of additional rent," was held not entitled to contravene the prohibition on payment of the extra rent.[10]

Subsection (7).—*Damages as a Counter-claim.*

966. The general rule that an illiquid claim cannot be pleaded as a set-off against a liquid claim does not in all cases prevent a defender from founding on a claim of damages in answer to a demand for a definite sum due under a contract.[11] In the first place, where damages for breach of

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[1] *Magee* v. *Lavell*, 1874, L.R. 9 C.P. 107.
[2] *Johnston* v. *Robertson*, 1861, 23 D. 646, at p. 653.
[3] *Public Works Commissioners* v. *Hills*, [1906] A.C. 368.
[4] *Wallis* v. *Smith*, 1882, 21 Ch. D. 243, at p. 256; *Astley* v. *Weldon*, 1801, 2 B. & P. 346; *In re Newman*, 1876, 4 Ch. D. 724.
[5] *Thompson* v. *Hudson*, 1869, L.R. 4 H.L. 1, at p. 15.
[6] *Johnstone's Trs.* v. *Johnstone*, 19th January 1819, F.C.
[7] *Hyndman's Trs.* v. *Miller*, 1895, 33 S.L.R. 359; Menzies, Conv., 3rd ed., p. 890; cf. *Dingwall* v. *Burnett*, 1912 S.C. 1097, where authorities reviewed and commented on.
[8] Ersk. iii. 3, 86.
[9] *Hyndman's Trs.* v. *Miller*, *supra*.
[10] *Gold* v. *Houldsworth*, 1870, 8 M. 1006.
[11] *Ross* v. *Ross*, 1895, 22 R. 461.

contract are liquidated by the terms of the contract, the case is clearly outwith the rule. Accordingly, a claim of damages sustained by reason of delay on the part of contractors in executing certain work, liquidated by the agreement at £5 per week after a specified date, was held to be a good answer to a demand for the price of the work executed.[1] In the second place, the principle applies that one party is not entitled to enforce performance of a contract if he has himself violated an express condition thereof.[2] On this ratio a defender, in circumstances similar to those in *Johnston's* case, with the difference that there was no penalty clause in the contract, was held entitled to have the amount of his damage ascertained in the action *ope exceptionis*.[3] But it was considered essential that there was an express provision in the contract as to the time allowed for its execution; and if the only complaint of the defender had been that the work had not been completed in reasonable time—an implied condition in all contracts—that would not have led to the same result.[4] If, however, the stipulations founded on on both sides are implied, non-performance on the one side is a good answer to a claim for performance on the other.[5]

967. The applicability of the plea that non-performance by the one party entitles the other to withhold performance of his obligation, depends on the question whether the two obligations are conditional with respect to one another.[6] This condition has been held to be fulfilled where a tradesman by unskilful coppering of a vessel's bottom had caused damage greater than the price sued for;[7] where a person, suing for rent, had failed to put the buildings into tenantable repair;[6] had broken a condition of the lease, that he should not let an adjoining shop to a person in the same trade, whereby the defender's business had suffered to an amount greater than the rent claimed;[8] or had by his neglect allowed grain stored in his warehouse to get injured.[5] The plea of compensation would probably be also allowed against a law agent suing for an account in connection with business he had conducted negligently, to the damage of his client.[9] It is to be observed, however, that the plea of non-performance is sometimes rather a plea of not due, than of compensation—as, for instance, where a claim for rent is met with the answer that possession of part of the subjects let has not been given.[10] This is so in the case of an article supplied under an executorial contract, so that it cannot or need not be returned, and alleged to be disconform to contract. The remedy consists in the retention of

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[1] *Johnston* v. *Robertson*, 1861, 23 D. 646.
[2] *Lovie* v. *Baird's Trs.*, 1895, 23 R. 1.
[3] *Macbride* v. *Hamilton & Son*, 1875, 2 R. 775, at p. 784.
[4] *Macbride* v. *Hamilton & Son*, *supra*, at p. 781.
[5] *Gibson* v. *Brown & Co.*, 1876, 3 R. 328.
[6] *Sivright* v. *Lightbourne*, 1890, 17 R. 917, at p. 920.
[7] *Hunter* v. *Mitchell*, 1858, 20 D. 1353; *Scottish North-Eastern Rly. Co.* v. *Napier*, 1859, 21 D. 705.
[8] *Davie* v. *Stark*, 1876, 3 R. 1114.
[9] *Burt* v. *Bell*, 1861, 24 D. 13; *Dixon*, 1863, 36 Sc. Jur. 30.
[10] *Muir* v. *M'Intyres*, 1887, 14 R. 470.

the sum in excess of its true value, the buyer being entitled to deduct the sum which represents the difference between the value of the article contracted for and that actually furnished.[1]

968. The condition attaching to the pleading of damages as a counter-claim, that the counter-claim must arise out of the same contract as the claim sued on, is strictly enforced. Where a carrier sued for freight of certain goods, the defender was not allowed to prove damage suffered by delay in delivering another parcel of goods under another contract;[2] and where an outgoing tenant sued his landlord for the price of the waygoing crop, which had been ascertained in a submission as provided for in the lease, the defender was not allowed to set off against the price an illiquid counter-claim under the lease for damages for miscropping and for failure in the upkeep of buildings. The tenant's action was said not to be founded on the contract of lease, but on a separate and distinct contract which had no necessary connection with the lease. The landlord had bought and received the crop at a fixed price, and having got the full consideration for the money he was asked to pay, it was no defence to prove a claim of damages arising out of another matter.[3]

Section 4.—Rules in Delict.

Subsection (1).—*General.*

969. While, as has been shewn, there are, in cases of contract, rules capable of definite statement and generally applicable, the rules in delict are much less definite, and differ in different classes of delict. A further uncertainty arises from the fact that the award is usually made by a jury, for, differing therein from one made by an inferior judge,[4] the award of a jury will not be interfered with by the Court unless the sum is altogether so extravagant that the award can be considered perverse.[5] In one case it was said that unless the Court is of opinion "that the verdict ought not to have been for more than one-half of the sum awarded, there is not, according to our practice, any room for interference."[6] But a jury is bound by certain rules as to what may and what may not be included as elements of damage, and disregard of these, either as to insufficiency or excess,[7] will invalidate their finding.[8]

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[1] *Dick & Stevenson* v. *Woodside Steel and Iron Co.*, 1888, 16 R. 242; *Muldoon* v. *Pringle*, 1882, 9 R. 915; *Hunter* v. *Mitchell*, 1858, 20 D. 1353.

[2] *Scottish North-Eastern Rly. Co.* v. *Napier*, 1859, 21 D. 705.

[3] *Sutherland* v. *Urquhart*, 1895, 23 R. 284.

[4] *King* v. *British Linen Co.*, 1899, 1 F. 928.

[5] *Reid* v. *Morton*, 1902, 4 F. 438, at p. 441; *Watt* v. *Watt*, [1905] A.C. 115, at p. 118, per Lord Halsbury; *Casey* v. *United Collieries, Ltd.*, 1907 S.C. 690.

[6] *Young* v. *Glasgow Tramway and Omnibus Co.*, 1882, 10 R. 242; cf. *Elliot* v. *Glasgow Corpn.*, 1922 S.C. 146.

[7] *Reid* v. *Morton*, *supra*.

[8] *Young* v. *Glasgow Tramway and Omnibus Co.*, *supra*; *Elliot* v. *Glasgow Corpn.*, *supra*; *M'Laurin* v. *North British Rly. Co.*, 1892, 19 R. 346.

970. A broad distinction may be drawn between cases of injury arising from negligence or mistake and those arising from acts prompted by malice or wrongful motive. In the former class, damages will be restricted to what is considered to be compensation for the loss caused; in the latter, the injury may be held to be exaggerated from the manner in which it has been brought about, and a larger award of damages is allowed, although the actual loss may be the same. For instance, a person would probably recover more for a broken leg if it had been caused by the defender assaulting him than he would if it had been caused by a bale falling from defender's cart through the negligence of the driver. Similarly, where the damage has been caused without fraud or malice, only the intrinsic value of an article is recoverable and not the *pretium affectionis*.[1]

Subsection (2).—*Action Founded on Negligence.*

971. Where the amount of the loss is capable of exact or approximate ascertainment, as in the case of injury to property, the extent of which can be estimated by reference to depreciation in selling value, no difficulty arises, and damages are awarded on the footing that the pursuer is compensated for his loss. But where such a test is inapplicable, as in the case of injury to the person, the award cannot be said to be compensation in the sense of putting the pursuer in as good a position as he was prior to the accident.

(i) *Injury to the Person.*

972. No money award can be an equivalent for the loss of a limb or eyesight or brain-power, and the law does not assume that the pursuer would have chosen to suffer the injury for any money payment.[2] It allows three elements to be taken into consideration in fixing an award in cases of this kind. In the first place, it must be given for the expenses to which the pursuer has been put, on account of the accident, for medical attendance, lodging, or other outlays; in the second place, for the physical suffering which has been thereby occasioned, whether temporary or permanent; and in the third place, for the loss of income or of business which has resulted, so far as that can be proved.[3] Earnings lost prior to the date of trial may of course be recovered in full.[4] The amount awarded for future loss of business or professional income will be the fairest estimate that can be made, in view of the uncertainties of life and business affairs, of the probable continuance of the pursuer's income. Contingencies, such as accident or bankruptcy, are not to be disregarded.[5] Therefore the damages are not to be calculated as

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[1] Ersk. ii. 1, 14.
[2] *Rowley* v. *London and North-Western Rly. Co.*, 1873, L.R. 8 Ex. 221, at p. 231.
[3] *Young* v. *Glasgow Tramways and Omnibus Co.*, 1882, 10 R. 242, at p. 243.
[4] *Reid* v. *Morton*, 1902, 4 F. 438.
[5] *Johnston* v. *Great Western Rly. Co.*, [1904] 2 K.B. 250.

the value of an annuity for the rest of his life, of the same amount as the pursuer's average income.[1] If a pursuer makes a specific claim for injury to business, he must submit his business books to inspection on behalf of the defender,[2] just as he must allow himself to be medically examined as to the extent of his physical injuries.[3] But a claim for damage to business capacity may be entertained although no specific loss to business is alleged or proved,[4] and impaired chance of obtaining employment in the open market is a relevant consideration.[5]

(ii) *Loss of Relative.*

973. When a person sues for damages for the loss of a relative, in those cases where such a claim is competent, a sum for *solatium* for wounded feelings is allowed in addition to that for loss of support. The reported cases afford no satisfactory guide as to what amount will be allowed for *solatium*, but the practice has been to allow up to £200.[6] The amount allowed for loss of pecuniary support or assistance is also left indefinite. In one case where £550 was allowed on account of the death of a son in partnership with the pursuer in a business supposed to be worth £700, of which £100 might be supposed to be worth of the son's services to the pursuer, the sum allowed was considered not excessive.[7] In another case the sum of £900 awarded to pursuer for the death of her husband, who was earning only £150 per annum, was reduced by the Court to £500.[8]

(iii) *Aggravation of Damages.*

974. In an action laid on negligence damages are assessed solely on consideration of the pursuer's loss and are not subject to increase on account of the conduct of the defender. It is an irrelevant consideration that the defender acted maliciously,[9] or that he acted with gross carelessness.[10] The condition of the pursuer, however, may be regarded, "for the wrong-doer must take his victim *talem qualem*, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrong-doer, who has got to be answerable for the consequences flowing from his tortious act. On the other hand, the victim, being in fact a poor man, is not entitled to claim damages in

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[1] *M'Kechnie* v. *Henderson*, 1858, 20 D. 551; *Phillips* v. *London and South-Western Rly. Co.*, 1879, 5 Q.B.D. 78; *Casey* v. *United Collieries, Ltd.*, 1907 S.C. 690.

[2] *Johnston* v. *Caledonian Rly. Co.*, 1892, 20 R. 222; *Craig* v. *North British Rly. Co.*, 1888, 15 R. 808.

[3] *Junner* v. *North British Rly. Co.*, 1877, 4 R. 686.

[4] *M'Laurin* v. *North British Rly. Co.*, 1892, 19 R. 346.

[5] *Robertson* v. *Henderson & Sons*, 1905, 7 F. 776.

[6] *Horn* v. *North British Rly. Co.*, 1878, 5 R. 1055, at p. 1075; *Wallace* v. *West Calder Co-operative Society*, 1888, 15 R. 307; *Elliot* v. *Glasgow Corpn.*, 1922 S.C. 146.

[7] *Horn* v. *North British Rly. Co.*, *supra.*

[8] *Wallace* v. *West Calder Co-operative Society, supra;* cf. *Elliot* v. *Glasgow Corpn., supra.*

[9] *Clippens Oil Co.* v. *Edinburgh and District Water Trs.*, 1907 S.C. (H.L.) 9, at p. 15.

[10] *Black* v. *North British Rly. Co.*, 1908 S.C. 444.

respect of lost opportunities which he could not have utilised unless he had been rich." [1] In breach of promise of marriage, which is an anomalous case, since, though the action is brought on contract, the damages are founded on fault, the conduct of the defender is a relevant part of the inquiry.

(iv) *Violent Profits.*

975. In the computation of damages in respect of possession of land without a title, inquiry is also allowed as to the conduct of the defender. If possession has been in *mala fide*, as in the case of a tenant who fails or refuses to leave after due warning, or of a person possessing throughout without a title, violent profits will be awarded.[2] Whether a tenant has possessed *in mala fide* or *in bona fide* is always a question of circumstances. "When possession has commenced in good faith, it lies with the true owner to show when it ceased to be so, before the right to demand violent profits can prevail. Secondly, where possession has been continued during a litigation regarding the title of the possessor, it is sufficient to support the possessor's plea of *bona fides* that he had *probabilis causa litigandi*; and third, the principle is equally applicable whether the possession be challenged in respect of want of title in the possessor's author, or in respect of the nature and conditions of his own right." [3] The measure of the damage in rural subjects is what the pursuer could have made of the subject if he had been in possession, and all the damage done to the subject by the defender.[4] In urban subjects, violent profits have been estimated at double the rent.[5] The claim for the excess rent prescribes in three years.[6]

(v) *Wrongful Abstraction of Minerals.*

976. In the analogous case of abstraction of minerals by an adjoining mineral tenant the rule now acted on is to find the defender liable merely in the actual loss to the pursuer where the defender has acted innocently, and to deal with him according to the rule laid down in *Gardner's* case [4] where he has acted in bad faith, or culpably.[7] Thus where a coal-mining company worked out coal under an adjoining proprietor's land in the belief, which the proprietor shared, that the coal belonged to them, and it appeared that the proprietor could not himself have worked the coal to a profit on account of its small extent, the company were found liable only in a lordship on the coal excavated, calculated at the rate paid by them to the superior for the surrounding coalfield.[8] On the other hand, where a railway company excavated

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[1] *Clippens Oil Co.* v. *Edinburgh and District Water Trs.*, 1907 S.C. (H.L.) 14.
[2] *Tod* v. *Fraser*, 1889, 17 R. 226. (As to caution in a removing, see Act 1555, c. 39.)
[3] *Houldsworth* v. *Brand's Trs.*, 1876, 3 R. 304, at p. 310.
[4] *Gardner* v. *Lucas*, 1877, 4 R. 1091.
[5] *Watt* v. *Bell & Balfour*, 1822, 1 S. 509; Ersk. ii. 6, 54.
[6] Ersk. Prin., 19th ed., p. 185.
[7] *Peruvian Guano Co.* v. *Dreyfus*, [1892] A.C. 166, at pp. 167–178.
[8] *Livingstone* v. *Rawyards Coal Co.*, 1880, 7 R. (H.L.) 1.

freestone under the lands occupied by them in obvious disregard of their title, by which minerals were reserved to the superior, they were found liable in the market value of the stone removed by them, less the cost of working, although it appeared that the superior could not have worked it himself.[1] The cost of working will usually be allowed as a deduction in favour of the defender,[2] but misconduct may deprive him of this allowance.[3]

(vi) *Mitigation of Damages.*

977. In mitigation or reduction of damage it may be shewn that the pursuer, by reasonable care, could have diminished the loss suffered. But facts which, if pleaded, would be a bar to the action are not admissible for the purpose of reducing damages.[4] Thus where the want of care on the pursuer's part amounts to contributory negligence, that must operate as a complete answer to pursuer's claim, and cannot be made a ground for deducting a sum from the damages he would otherwise have got.[5] Where the apparent damage is greater than the real, on account of some circumstances special to the individual case, these may be pleaded—as, for instance, in breach of promise, that the defender was an undesirable husband.[6] But it is not allowable to plead, in cases of personal injury, that because the pursuer has private means he is less entitled to damages;[7] or that the loss is covered by insurance.[8] That would be to make the injured person pay for the defenders' wrongdoing out of his own pocket.[9]

(vii) *Statutory Limitations.*

978. Statutory limitations of liability are introduced by various Acts, general and local, which are too numerous to discuss here, but which will be found under the appropriate headings. The statutory provision may restrict the amount recoverable, or it may restrict the time during which an action may be brought, or it may declare that no action will lie for mere negligence in executing the Act.

(viii) *Infringement of Patent.*

979. Infringement of patent renders the party infringing liable either in the profits he has made or in damages, but not in both.[10] If profits are taken, there must be an accounting; if the pursuer elects to

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[1] *Davidson's Trs.* v. *Caledonian Rly. Co.*, 1895, 23 R. 45.
[2] *McArthur* v. *Cornwall*, [1892] A.C. 75, at p. 89.
[3] *Bulli Coal Mining Co.* v. *Osborne*, [1899] A.C. 351.
[4] Mayne on Damages, 9th ed., p. 109; cf. *Watt* v. *Watt*, [1905] A.C. 115, at p. 168.
[5] *Florence* v. *Mann*, 1890, 18 R. 247.
[6] *Irving* v. *Greenwood*, 1824, 1 C. & P. 350.
[7] *Phillips* v. *London and South-Western Rly. Co.*, 1879, 5 Q.B.D. 78.
[8] *Simpson & Co.* v. *Thomson*, 1877, 5 R. (H.L.) 40.
[9] *Bradburn* v. *Great Western Rly. Co.*, 1874, L.R. 10 Ex. 1.
[10] *Neilson* v. *Betts*, 1871, L.R. 5 H.L. 1.

take damages, they will be calculated on the footing that his damage is the profit he would have made in selling the quantity of goods sold by the infringer, subject to deduction on account of anything shewing that the pursuer would not have effected sales so large as the infringer.[1] Where a patentee claimed damages in respect of the sale of articles which was an infringement of his patent, the damage suffered was held *prima facie* to be the profit the pursuer would himself have made had he effected the infringing sales; but that amount is subject to diminution if, and to the extent that, it appears on a consideration of the nature of the trade in question, the area of its exercise, the volume of competition, and the defender's business energy and skill, that the pursuer would not have effected these sales himself.[2] Where the pursuer grants licences to use his patent, the damage will be the amount of royalty which ought to have been paid on each article manufactured. If the article is made according to the patent, the licensee would normally have been entitled to manufacture it on payment of royalty, and he ought not to be in a worse position than if he had accounted for the royalty throughout.[3] If the user of the article pays the royalty, the manufacturer is not further liable.[4]

(ix) *Infringement of Trade Mark.*

980. Every sale without licence of a patented article must be a damage to the patentee, but the case of sale of an article under a trade mark is different, because, in the latter, the article sold is open to the whole world to manufacture, and the objection of the pursuer is to goods being sold under his mark. Consequently, the pursuer cannot claim damages for every article sold by defender under his mark, but must shew that his trade has suffered[5] and to what extent.[6]

Subsection (3).—*Action Founded on Malice.*

981. Where an action is founded on malice, either express or implied, damages are understood to be punitive as well as reparatory in their nature, and more than merely nominal damages may be recovered although no actual loss is shewn. Thus a verdict for £50 for calling a man a thief was considered not excessive, although there was no attempt to prove real damage.[7] But though substantial damages will be allowed for serious slander, or insulting assault, large damages will not be allowed where no special damage is shewn; and in cases of imputations on

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[1] *United Horse Shoe and Nail Co.* v. *Stewart*, 1888, 15 R. (H.L.) 45.

[2] *Watson, Laidlaw & Co.* v. *Pott, Cassells & Williamson*, 1913 S.C. 762; affd. 1914 S.C. (H.L.) 18.

[3] *Roger* v. *Cochrane & Co.*, 1908, 25 Rep. Pat. Cas. 9; affd. [1909] A.C. 285.

[4] *Penn* v. *Jack*, 1867, L.R. 5 Eq. 81.

[5] *Davenport* v. *Rylands*, 1865, L.R. 1 Eq. 302, at p. 308.

[6] *British Motor Syndicate* v. *Taylor*, [1900] 1 Ch. 583. For a discussion of the general law applicable, cf. Salmond on Torts, 6th ed., pp. 556 *et seq.*

[7] *Fletcher* v. *Wilsons*, 1885, 12 R. 683.

business men, where injury to business has not been proved, the Court has offered the pursuer the alternative of a reduced award or a new trial.[1] As malice, though present only in the legal sense, may render an act wrongful, it naturally follows that the greater the malice the more wrongful the act, and that special malice or personal ill-will may be proved in aggravation of damages.[2] With this object it is competent to prove that a libel was written in pursuance of a scheme to destroy the pursuer's reputation, or done deliberately to gratify an *animus* on the part of the defender;[3] and that the defender went about repeating the accusation complained of.[4] An intentional wrong will found heavier damages than a merely negligent one.[5] In mitigation of damage, on the other hand, it may on the same principle be shewn what the state of mind of the author of a slander was. The whole circumstances of the utterance may be proved,[6] in order to shew that information supplied to him was such as to lead him to suppose that the charge was true;[7] or that he had received provocation;[8] or that the charge was matter of common report.[9] But where the defender is not the writer, but only the publisher of a libel, he will not be allowed to prove, in mitigation, circumstances which might have affected the writer, but of which the defender was ignorant.[10] In all actions in which a pursuer puts his or her character in issue, as in slander or seduction,[11] it may be shewn that the pursuer's character has been previously impaired.[12] The pursuer's conduct in the matter in question may be inquired into.[13]

Subsection (4).—*Compensatio injuriarum.*

982. The rule which, in cases of breach of contract, excludes a counter-claim not founded on the same subject-matter, also excludes the setting off of one injury against another, since the foundation of the claim and counter-claim are separate wrongs. This plea was at one time competent to a defender, to the effect that the pursuer had caused him injury at least as great as that complained of, whereby the pursuer's claim was extinguished. It was entertained in actions for slander and assault; but since the decision in the case of *Tullis*,[14] the law has been that a defender founding on a counter-claim of injury must raise a

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[1] *Ritchie* v. *Barton*, 1883, 10 R. 813; *Johnstone* v. *Dilke*, 1875, 2 R. 836.
[2] Mayne on Damages, 9th ed., p. 43.
[3] *Cunningham* v. *Duncan & Jamieson*, 1889, 16 R. 383. For the rule in Contract, cf. *Allen* v. *Flood*, [1898] A.C. 1.
[4] *Douglas* v. *Main*, 1893, 20 R. 793.
[5] *Thomson & Co.* v. *Dailly*, 1897, 24 R. 1173.
[6] *White* v. *Clough*, 1847, 10 D. 332.
[7] *Cunningham* v. *Duncan & Jamieson*, *supra*; *Ogilvie* v. *Scott*, 1836, 14 S. 729.
[8] *Tullis* v. *Crichton*, 1850, 12 D. 867; *Paul* v. *Jackson*, 1884, 11 R. 460.
[9] *M'Culloch* v. *Litt*, 1851, 13 D. 960. See Cooper on Defamation, 2nd ed., p. 255.
[10] *Browne* v. *MacFarlane*, 1889, 16 R. 368.
[11] *Bern's Exr.* v. *Montrose Asylum*, 1893, 20 R. 859.
[12] *Macdonald* v. *Begg*, 1862, 24 D. 685; cf. *H.* v. *P.*, 1905, 8 F. 232.
[13] *Shaw* v. *Morgan*, 1888, 15 R. 865, at p. 871; *Paul* v. *Jackson*, *supra*.
[14] *Tullis* v. *Crichton*, *supra*.

separate action against the pursuer, and is not entitled to a counter-issue in the leading action.[1]

Subsection (5).—*Relief.*

983. In delict, the action of relief is generally available where the pursuer and the defender have been under a common obligation, which ought first to have been performed by the defender, and which, by his neglect, has been cast upon the pursuer, so that the pursuer, having been sued, has been forced to pay damages. These damages, together with the costs of his adversary and his own costs in the suit, constitute the aggregate sum recoverable in the action of relief.[2] There are therefore three conditions necessary for the success of an action of relief: (1) that the pursuer was bound to pay; (2) that the defender, if he had been sued would have been bound to pay; (3) that the liability of the defender is commensurate with that of the pursuer claiming the relief. Accordingly an action of relief is excluded (1) where no claim has been made against the pursuer,[3] or where it has been unnecessarily admitted, as where a master voluntarily pays damages to an injured workman which it appears he is under no legal obligation to pay,[4] or where a claim has merely been intimated but not established;[5] (2) where the pursuer is obliged to pay on account of a breach of duty incumbent on him, but not existing between the defender and the party injured;[6] and (3) where the pursuer has been held liable for his own fault, and it is sought to hold the defender liable in breach of contract.[7] If the pursuer has relied on a warranty given by the defender, it appears that an action will lie.[8]

984. Where the party claiming relief has paid, partly on his own account and partly on behalf of him from whom relief is claimed, as in the case of co-delinquents, he is entitled to recover the amount paid on account of the other delinquent. The respective shares of contribution are fixed by equal division among the whole delinquents, and not by apportionment in accordance with different degrees of *culpa*.[9] This remedy is, however, available only to those who have committed a quasi-delict, and not to those whose acts or omissions are tainted with fraud or other moral delinquency.[10]

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[1] *Bertram* v. *Pace*, 1885, 12 R. 798.

[2] *Colt* v. *Caledonian Rly. Co.*, 1860, 3 Macq. 833, at p. 840.

[3] *Eliott's Trs.* v. *Eliott*, 1894, 21 R. 858.

[4] *Kiddle* v. *Lovett*, 1886, 16 Q.B.D. 605; *Ovington* v. *M'Vicar*, 1864, 2 M. 1066; *Gardiner* v. *Main*, 1894, 22 R. 100.

[5] *Duncan's Trs.* v. *Steven*, 1897, 24 R. 880.

[6] *Colt* v. *Caledonian Rly. Co.*, *supra*; *Clarke* v. *Scott*, 1896, 23 R. 442.

[7] *Ovington* v. *M'Vicar*, *supra*; *Wood* v. *Mackay*, 1906, 8 F. 625.

[8] *Mowbray* v. *Merryweather*, [1895] 2 Q.B. 640; cf. *Vogan* v. *Oulton*, 1898, 15 T.L.R. 33; 1899, 16 T.L.R. 37; *Bentley* v. *Metcalfe*, [1906] 2 K.B. 548; cf. *Scott* v. *Foley, Aikman & Co.*, 1899, 16 T.L.R. 55; *The "Annie,"* [1909] P. 176.

[9] *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.*, 1894, 21 R. (H.L.) 39.

[10] *Ibid.*, per Lord Watson at p. 46.

985. Relief is also competent where the party claiming it has had to pay on the ratio of the maxim *qui facit per alium, facit per se.* The simplest case is that of a master who had to pay on account of his servant's negligent act; but the right of relief has been allowed where the relationship is not so close. An employer of a builder, whose unskilful operations in excavating the foundations of a house injured neighbouring property, having settled the claim of damage with his neighbour, was found entitled to relief against the builder;[1] and a proprietor who employed a plumber to repair water pipes, which, being unskilfully done, caused damage by flooding to a tenement below, and who was sued and had to pay, recovered from the plumber the amount of damage so paid, and also the expense of defending the original action.[2]

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[1] *Pollock* v. *Wilkie*, 1856, 18 D. 1311.
[2] *M'Intyre* v. *Gallacher*, 1883, 11 R. 64.

DAMNUM FATALE.

See REPARATION.

DANGEROUS PERFORMANCES.

See CHILDREN AND YOUNG PERSONS.

DAY.

See TIME, COMPUTATION OF.

DAYS OF GRACE.

See BILLS OF EXCHANGE.

DEAD BODY.

See BURIAL AND CREMATION; CRIME.

DEAD FREIGHT.

See CARRIAGE BY SEA.

DEAD'S PART.

See LEGITIM; SUCCESSION.

DEAF AND DUMB.

See EDUCATION; WITNESS.

DEAN OF GUILD.

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Section 1.—History.

Subsection (1).—*Origin and Customary Powers.*

986. The Dean of Guild appears early in municipal history [1] as the President of a body known as the Merchants' Guild, Guild Brethren or Guildry, composed of the merchant traders who by birth or personal entry had acquired the freedom of a royal burgh. The Guildry usually constituted a sub-incorporation provided for in the charter of the burgh or created by the magistrates,[2] and the Dean and his Council soon acquired by custom an extensive jurisdiction in causes between merchant and merchant or merchant and mariner. This jurisdiction was confirmed by the Act 1593, c. 184, which prescribes that the judgments of the Court are to have full strength, force, and effect "according to the lovable form of judgement used in all gude tounes of France and Flanders . . . and specially in Paris, Roan, Bourdeaux, Rochell." The Court's mercantile jurisdiction, however, gradually fell into complete desuetude; but its place was taken by a customary ædilic jurisdiction, of the origin and development of which little is known. It appears, however, that "questions of neighbourhood"

General Authorities.—Campbell Irons, Dean of Guild Court; Muirhead, Municipal and Police Government; Whyte, Local Government in Scotland.

[1] See 1469, c. 5.

[2] *Somerville* v. *Lord Advocate*, 1893, 20 R. 1050; *Lamont* v. *Cumming*, 1875, 2 R. 789, opinion of Lord Deas.

were dealt with by the Edinburgh Dean of Guild as early as 1584, and by the Glasgow Court from the time of its establishment in 1605. By the middle of the eighteenth century the scope and nature of this jurisdiction were capable of precise definition;[1] and it is still possible to accept as exhaustive and accurate the classic statement of Erskine[2] that "it belongs to the Dean of Guild to take care that buildings within borough be agreeable to law, neither encroaching on private property, nor on public streets or passages; and that houses in danger of falling be thrown down."

Subsection (2).—*Statutory Modifications.*

987. In the course of last century the constitution and duties of the Dean of Guild Court were subjected to successive statutory modifications. By the Royal Burghs Act of 1833,[3] the Deans of Guild of Edinburgh, Glasgow, Aberdeen, Dundee, and Perth were made constituent members of the town councils of these cities respectively; but as regards all other royal burghs it was enacted that the office and title of Dean of Guild, as an official and member of the town council, should cease, and that the duties and functions theretofore performed by the Dean of Guild or his Court should, in all burghs where there then was such an officer, be performed by a member of the council to be elected by a majority of the councillors. The Acts of 1850[4] and 1862,[5] providing for the formation of Police Burghs, conferred on the magistrates of police the same jurisdiction as was exercised by the Dean of Guild of a royal burgh; but for some reason these powers were not widely exercised, with the result that from an administrative standpoint matters fell into considerable confusion. In some burghs ædilic powers were wielded by the Dean of Guild, in others by the magistrates,[6] in others by an elected councillor, and in others by the police commissioners; while in many cases no court was held for the transaction of Dean of Guild business, so that the only remedy available to aggrieved proprietors was recourse to the Sheriff or other civil court.[7]

Subsection (3).—*The Position since* 1892.

988. The modern administrative system was inaugurated by the Burgh Police (Scotland) Act of 1892.[8] By 1892 the police administration of the five "excepted burghs," viz. Edinburgh, Glasgow, Aberdeen, Dundee, and Greenock, had come to be regulated by local statutes;[9] and by the Burgh Police (Scotland) Act[8] existing Dean of Guild Courts

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[1] Bankton, iv. 20, 2.
[2] i. 4, 24.
[3] 3 & 4 Will. IV. c. 76, ss. 19 and 22.
[4] 13 & 14 Vict. c. 33, s. 345.
[5] 25 & 26 Vict. c. 101, s. 408; *Tainsh* v. *Mags. of Hamilton*, 1877, 4 R. 315.
[6] Bankton, iv. 20, 7; *Lamont* v. *Cumming*, 1875, 2 R. 784, 789; *Neilson* v. *Vallance*, 1828, 7 S. 182.
[7] Law Courts Commission, 4th Report, p. 36; Rankine, Land-Ownership, 4th ed., p. 681.
[8] 55 & 56 Vict. c. 55.
[9] See paras. 991 to 995, *infra*.

throughout the rest of Scotland were confirmed in their common law jurisdiction,[1] and were also entrusted with important additional statutory duties. Section 454 of the Act re-enacted the provisions of the earlier Police Acts to the effect that the magistrates of police in a police burgh should be equipollent with the Dean of Guild of a royal burgh; while section 202 authorised (1) the commissioners of any burgh having no Dean of Guild Court to establish such a Court, and (2) the commissioners of any burgh having an existing Court to discontinue that Court as then constituted, and to establish a new Court under the Act. The powers of a Court so established would appear to be confined to those prescribed by statute, for there is no provision in the Act extending to such Courts the common law jurisdiction of the Dean of Guild. By s. 102 of the Town Councils (Scotland) Act, 1900,[2] the rights and privileges enjoyed in the five excepted burghs, in Perth, and also in royal burghs which were in the habit of appointing councillors under the Royal Burghs Act, 1833,[3] were expressly reserved and confirmed; and by s. 42 of the Burgh Police (Scotland) Act, 1903,[4] it was provided that in any burgh possessing no Dean of Guild Court, the functions of that Court under the Burgh Police Acts should be performed by the town council.

989. As a result of these reiterated and overlapping provisions, there now is available to every burgh in Scotland a tribunal entitled to exercise most, if not all, of the traditional and modern functions of a Dean of Guild Court; and, as the statutory duties of the Court have in most burghs tended to supersede and overlay the ancient common-law jurisdictions, the historical distinctions between the various types of Dean of Guild Court are now of little practical significance. At the same time it is worthy of note that the *genus* as it exists to-day may include the following different species:—(1) The Courts of Edinburgh, Glasgow, and Greenock, now largely regulated by local Acts; (2) the Court of Dundee, exercising within the royalty a purely common-law jurisdiction; (3) the Court of Perth, singled out for exceptional treatment by the Royal Burghs Act, 1833; (4) Courts presided over by a member of council elected in terms of the Act of 1833; (5) Courts conducted by the magistrates under s. 454 of the Act of 1892; (6) Courts established under s. 202 of the Act of 1892; and (7) Courts conducted by the town council under s. 42 of the Act of 1903. The fifth and sixth types of Court, which are by far the commonest, have no apparent claim to the ancient common-law jurisdiction of the Dean of Guild. So far as the fifth class is concerned, this difficulty may be, and has been, overcome by the expedient of establishing a Court consisting of the provost and magistrates, who will enjoy under s. 454 the customary jurisdiction of the Court, and will simultaneously exercise under s. 202 the powers conferred by statute.[5]

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[1] 55 & 56 Vict. c. 55, s. 201. [2] 63 & 64 Vict. c. 49. [3] 3 & 4 Will. IV. c. 76.
[4] 3 Ed. VII. c. 33. [5] Muirhead, Police Government, i. 503.

Section 2.—Constitution of Courts.

990. For the historical reasons discussed in the preceding sections, the constitution of the Dean of Guild Court varies widely in different burghs, and may depend upon usage, charter, or public or local statute. Before passing to the consideration of the normal case of a Court established and operating under the Police Burgh Acts, it is necessary to refer to the specialities affecting the five excepted burghs to which these Acts in their entirety do not apply.

Subsection (1).—*Courts in the Excepted Burghs.*

(i) *Edinburgh.*

991. As a tribunal for the regulation of buildings and "questions of neighbourhood" the Edinburgh Dean of Guild Court can be traced back to the sixteenth century. The present constitution and statutory powers of the Court had formerly to be sought in a large number of local Acts commencing in 1879; but these provisions have now been re-enacted in a consolidating Order passed in 1926.[1] The Court consists of fifteen members,[2] including (1) the Lord Dean of Guild appointed by the Guildry and *ex officio* a member of the town council;[3] (2) seven town councillors, of whom two must represent Leith; and (3) seven electors, of whom five must be architects, civil engineers, surveyors, or master builders. The members other than the Lord Dean are elected annually by the corporation.[4] Five members constitute a quorum,[5] and each member has a vote, the Lord Dean, or other President for the time being, having in addition the right to a casting vote.[6] The Court's customary powers are expressly reserved,[7] while in addition it is vested with very ample statutory powers relating to buildings which are detailed in Part III. of the order[8] and which apply throughout the extended city.[9] The Court enjoys the exceptional power of controlling the elevation, design, and materials of new buildings by reference to considerations of amenity.[10] The Sheriff Court forms have not been adopted in Edinburgh, procedure being modelled on the basis of the old Acts of Sederunt.[11]

(ii) *Glasgow.*

992. The constitution of the Court in Glasgow rests upon a Letter of Guildry enacted in 1605. The Court consists of eight members, of whom four, including the Lord Dean of Guild, are elected by the Merchants' House, and four by the Trades House. The Lord Dean of

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[1] Edinburgh Corporation (Streets, Buildings, and Sewers) Order Confirmation Act, 1926 (16 & 17 Geo. V. c. lxv.).
[2] *Ibid.*, s. 6.
[3] 63 & 64 Vict. c. 49, s. 102.
[4] 1926 Order, ss. 7, 8.
[5] *Ibid.*, s. 11.
[6] *Ibid.*, s. 10.
[7] *Ibid.*, s. 13.
[8] *Ibid.*, ss. 26–71.
[9] 10 & 11 Geo. V. c. lxxxvii. s. 23.
[10] 1926 Order, s. 44.
[11] See para. 1010, *infra*.

Guild and the Deacon Convener of the Trades House are *ex officio* members of the town council.[1] The Lord Dean, while acting in consultation with the "Lyners of Court," is in theory the sole judge in a cause, and interlocutors run in his name. The present jurisdiction of the Court, which applies to the whole of the extended city, is mainly based upon the provisions of the Glasgow Police Act of 1866,[2] and the Buildings Regulations Act of 1900 [3] (as amended in various details by subsequent orders passed in 1914 [4] and 1927 [5]), and covers the whole field of the regulation of buildings and streets.

(iii) *Aberdeen.*

993. The Guildry of Aberdeen elect a Dean of Guild who is *ex officio* a member of the town council,[6] and who is usually appointed Convener of the Plans Committee. The Dean of Guild Court has, however, long since ceased to function, the duties which would normally have fallen within its province being performed by the Plans Committee of the town council under various local statutes of which the most important are the Aberdeen Police and Waterworks Act, 1862,[7] the Aberdeen Municipality Extension Act, 1871,[8] and the Aberdeen Corporation Act, 1891.[9]

(iv) *Dundee.*

994. The position of the Dean of Guild Court of Dundee is highly exceptional. The election of the Dean of Guild lies with the Merchants' Guild, and rests upon a contract between the Merchants and the Town Council, dated 10th October 1515, subsequently confirmed by Charter of James V. Notwithstanding the wide extensions of the parliamentary and municipal boundaries of the city, the jurisdiction of the Dean of Guild is still confined within the ancient royalty of the burgh. Throughout the whole of the city the control of the erection of buildings is vested by local statutes in the town council; but where it is proposed to build within the royalty, the owner must, in addition to securing the town council's approval, obtain a warrant from the Dean of Guild "unless no question of possessory rights or disputed boundaries is, or may be, raised or involved." [10] It follows that the Dean of Guild of Dundee is now restricted to exercising within a limited area of the city a common law jurisdiction concurrent with the town council's statutory jurisdiction. The Dean of Guild is *ex officio* a member of the town council.[11]

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[1] 29 & 30 Vict. c. cclxxiii. s. 6; 54 & 55 Vict. c. cxxx. s. 18; 63 & 64 Vict. c. 49, s. 120.
[2] 29 & 30 Vict. c. cclxxiii.
[3] 62 & 63 Vict. c. cl.
[4] 4 & 5 Geo. V. c. clxxviii. s. 24.
[5] 17 & 18 Geo. V. c. cxv. s. 68.
[6] 62 & 63 Vict. c. 49, s. 102.
[7] 25 & 26 Vict. c. cciii.
[8] 34 & 35 Vict. c. cxli.
[9] 54 & 55 Vict. c. cxxiv.
[10] Dundee Police and Improvement Act, 1871 (34 & 35 Vict. c. cliii.), s. 183, re-enacted in various subsequent local statutes. The position in Dundee remains to-day as it was in *More* v. *Bradford*, 1873, 1 R. 208.
[11] Town Councils (Scotland) Act, 1900 (62 & 63 Vict. c. 49), s. 102.

(v) *Greenock.*

995. The constitution and powers of the Dean of Guild Court of Greenock are regulated by the Greenock Corporation Act, 1909,[1] by which it is provided that the corporation shall from time to time elect one of their own number to hold the office of Dean of Guild, with all the powers and privileges conferred by the Act or exercised by the Dean of Guild of any royal burgh in Scotland.[2] At their annual statutory meeting in November, the corporation elect six of their number to act as councillors of the Dean of Guild for the ensuing year,[3] one of whom is appointed Depute Dean of Guild.[4] In addition to exercising statutory powers of the usual type in relation to buildings, detailed in Part XIV. of the Act,[5] the Dean of Guild in Greenock has special duties in regard to the formation and the apportionment of the cost of streets [6] and sewers.[7] Procedure is on the model of the Burgh Police Acts.[8]

SUBSECTION (2).—*Courts under the Burgh Police Acts.*

(i) *Composition.*

996. The Court is established by resolution of the council passed at a meeting specially called for the purpose,[9] and consists of the Dean of Guild, or the provost of a burgh not having a Dean of Guild, and not less than two councillors, who may also be magistrates and who are elected annually.[10] The whole of the magistrates are not infrequently appointed. The town council may from time to time prescribe rules for regulating the dates of meeting, the quorum, and other matters affecting the conduct of business.[11] A member of the Court may not adjudicate upon any matter in which he is personally interested.[12]

(ii) *Officials.*

997. The officials of the Court may include (*a*) a Master of Works,[13] who is almost invariably the local Burgh Surveyor, and who acts as the Court's executive officer and technical adviser; (*b*) the Town Clerk acting as Clerk to the Court; [14] (*c*) the Burgh Prosecutor acting as Prosecutor in the Dean of Guild Court; [14] and (*d*) in some cases a legal assessor, usually appointed to advise on cases in which the Town Clerk or the Town Council is interested.[15]

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[1] 9 Edw. VII. c. cxxix. [2] *Ibid.*, s. 30. [3] *Ibid.*, s. 33.
[4] *Ibid.*, s. 34. [5] *Ibid.*, ss. 216–274 and Sched. VII. [6] *Ibid.*, ss. 173–189.
[7] *Ibid.*, ss. 198–203. [8] *Ibid.*, ss. 36 *et seq.*
[9] Burgh Police Act, 1892, s. 202. [10] *Ibid.*, s. 203.
[11] Burgh Police Act, 1903, s. 38. [12] Burgh Police Act, 1892, s. 203.
[13] *Ibid.*, s. 204. [14] *Ibid.*, s. 205.
[15] *Manson* v. *Smith*, 1871, 9 M. 492; *Macbeth* v. *Innes*, 1873, 11 M. 404. The Corporation of Edinburgh appoint two members of the Bar to act as senior and junior legal assessors to the Dean of Guild Court, Burgh Court, and Police Court. The Glasgow Dean of Guild Court enjoys the services of a special clerk and legal assessor.

Section 3.—Powers and Jurisdiction.

Subsection (1).—*Common Law Powers.*

998. At common law the ædilic jurisdiction of the Dean of Guild was exercised not only in the grant or refusal of permission to erect or alter buildings, but also in the settlement of any dispute within the burgh relating to boundaries, servitudes, possessory rights, nuisances, and the law of neighbourhood generally.[1] The precise limits of the Court's rights to interfere were the subject of numerous decisions;[2] but for the most part this tract of law has been rendered obsolete as a result of statutes by which the powers of the Court have been brought into harmony with modern needs. Except in such cases as the Court of Dundee, where the old common law has been left unaffected, it is now rare for any question to be submitted to a Dean of Guild Court which cannot be adequately disposed of by the exercise of specific statutory powers; and the jurisdiction of the Court is now never invoked except (1) in connection with petitions for warrants to conduct building operations or form streets, and (2) incidentally to the exercise of the special executive or preventitive powers conferred by statute.

Subsection (2).—*Modern Duties of the Court.*

999. The primary function of the Dean of Guild Court at the present time is the regulation and control of building operations within the burgh so as to prevent encroachment upon public or private rights, and to safeguard and promote public health and public safety. This control is made operative by the requirement that no building operations can be conducted without a warrant of the Court having first been procured. The powers of the Court in these directions have been progressively defined, enlarged, and modified by statute.

1000. The leading provision is s. 201 of the Act of 1892 which transferred from the Commissioners to the Dean of Guild Court the powers relating to:

(1) New buildings or alterations of existing buildings (ss. 166–180);
(2) Ventilation (ss. 181–185);
(3) Precautions during the construction, alteration, or repair of buildings and streets (ss. 186 and 188–190);
(4) Old and ruinous tenements (ss. 191–200); and
(5) Setting up of hoardings (s. 187).

Under the Act of 1903 provision was made for transferring, under certain conditions, to the Dean of Guild Court the powers of the town council as regards the sanctioning of new streets under ss. 11 and 12 of that Act, while the Court was further vested with new powers and duties in relation to the occupation of streets during building opera-

[1] See, *e.g.*, *Neilson* v. *Vallance*, 1828, 7 S. 182. [2] Bell's Prin., s. 2165.

tions,[1] scaffoldings,[2] inspection of buildings,[3] prohibiting unauthorised operations,[4] relaxation of restrictions,[5] imposing penalties for, or ordering restoration of, work illegally executed,[6] rounding off corners,[7] open spaces attached to dwelling-houses,[8] hollow squares,[9] advertisement hoardings,[10] public halls,[11] and hoardings erected during construction.[12]

1001. An examination of the foregoing provisions will disclose the miscellaneous and technical character of the issues upon which the Dean of Guild Court may be called upon to adjudicate, and it does not fall within the scope of the present article to analyse the sanitary and structural requirements prescribed by the statute.[13] The duties which the Court has to discharge may involve the exercise of judicial and executive functions, and of a preventitive and penal jurisdiction, to each of which brief reference must be made. In adjudicating upon practical and technical issues, the Dean of Guild Court enjoys a very ample discretion [14] with which the Court of Session as appellate Court will not interfere, provided that the discretion has been judicially exercised, and that no plain miscarriage of justice has taken place.[15] But decisions involving legal questions enjoy no special sanctity and are subject to appeal in the usual way.

Subsection (3).—*Judicial Functions.*

1002. The exercise of the Court's judicial functions in determining questions between private individuals is normally invoked in connection with petitions for warrants to form new streets [16] and (much more commonly) with petitions for warrants to erect or alter buildings. The latter class of petition requires under statute [17] to be presented by any person who proposes (1) to erect any house or building; [18] (2) to alter the structure thereof; (3) to use for human habitation any house or building not previously so used; (4) to increase the number of houses or occupancies in a building; (5) to alter, add to, take down, or restore buildings destroyed by fire or otherwise; [19] or (6) to make any excavation in connection with any of these operations.[19] In disposing of such applications, which are often opposed by adjoining proprietors or the superior, it is the duty of the Court to see that the

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[1] Burgh Police Act, 1903, ss. 27–29.
[2] *Ibid.*, s. 32. [3] *Ibid.*, s. 33. [4] *Ibid.*, s. 35. [5] *Ibid.*, s. 39.
[6] *Ibid.*, s. 41. [7] *Ibid.*, s. 62. [8] *Ibid.*, s. 63. [9] *Ibid.*, s. 72.
[10] *Ibid.*, s. 78. [11] *Ibid.*, s. 104 (2) (*l*). [12] *Ibid.*, s. 104 (2) (*m*).
[13] Reference may be made to the exhaustive commentary on the Acts contained in Muirhead's Municipal Government.
[14] *Mitchell* v. *Edinburgh Dean of Guild*, 1885, 12 R. 844; *Summerlee Iron Co.* v. *Lindsay*, 1908 S.C. 754; *Russell* v. *Cowpar*, 1882, 9 R. 660.
[15] See, *e.g.*, *Somerville* v. *Edinburgh Assembly Rooms*, 1899, 1 F. 1091; *M'Ghee* v. *Moncur*, 1899, 1 F. 594; *Somerville* v. *M'Donald's Trs.*, 1901, 3 F. 390.
[16] Burgh Police Act, 1903, ss. 11, 12.
[17] Burgh Police Act, 1892, s. 166.
[18] For definitions, see Burgh Police Acts, 1892, s. 4 (13), and 1903, s. 103 (1).
[19] Burgh Police Act, 1903, s. 104 (2) (*i*).

plans provide suitably for stability, light, ventilation, and other sanitary requirements,[1] and generally that the operations conform to statute; and, in the case of opposed applications, to determine such legal or other issues as fall within the Court's competence.[2] In exceptional cases the Court may, with the consent of the town council, relax or modify the provisions of the Acts, but each such case must be the subject of individual consideration on its merits.[3]

Subsection (4).—*Executive Functions.*

1003. In certain contingencies the Court may on its own initiative require or cause work to be executed on or in connection with buildings. They may, for instance, make provision for the proper ventilation of public halls and similar buildings,[4] and they may cause ruinous or dangerous structures to be taken down or secured under a procedure modelled on the ancient *jedge and warrant.*[5] They may cause tests to be made of the quality and strength of materials;[6] and they may authorise the town council to restore works illegally executed.[7] Expenses incurred by the Court in the execution of such powers, so far as not covered by court fees or recoverable from the owners of the buildings, will apparently fall on the Burgh General Assessment.[8]

Subsection (5).—*Preventitive Jurisdiction.*

1004. In addition to enjoying the foregoing powers, the Court may, under prescribed conditions, interfere to prevent the continuance of an abuse or to protect the public from risk of danger. They may, for example, interdict the use of a public hall or similar building not provided with proper means of access or exit or of protection from fire;[9] or the erection or use of a dangerous scaffolding;[10] or the prosecution of unauthorised operations.[11]

Subsection (6).—*Penal Jurisdiction.*

1005. The normal sanction employed by the Court for securing compliance with their orders or with the requirements of the statute is the imposition of pecuniary fines, for which provision is made in a large number of different sections. Such fines may be recovered by poinding or arrestment;[12] but it is specially to be noted that the Dean of Guild

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[1] Burgh Police Act, 1892, s. 167.
[2] See paras. 1007–1009, *infra.*
[3] Burgh Police Act, 1903, s. 39; *Porter* v. *Nisbet*, 1912 S.C. 400; *Maguire* v. *Smith's Trs.*, 1912 S.C. 410; *Summerlee Co.* v. *Lindsay*, 1908 S.C. 754.
[4] Burgh Police Act, 1892, s. 181.
[5] *Ibid.*, ss. 191 *et seq.*
[6] Burgh Police Act, 1903, s. 34.
[7] *Ibid.*, s. 41.
[8] Burgh Police Act, 1892, s. 207.
[9] Burgh Police Acts, 1892, s. 168, and 1903, s. 104 (2) (*l*).
[10] Burgh Police Act, 1903, s. 32.
[11] *Ibid.*, s. 35.
[12] *Ibid.*, s. 43.

Court is essentially a civil and not a criminal Court.[1] The Court of Session on appeal may modify the penalty imposed by the Court.[2]

Subsection (7).—*Persons subject to Jurisdiction.*

1006. The Crown is not subject to the jurisdiction of the Dean of Guild Court,[3] but the possession of statutory powers to build does not relieve a public company from the necessity of complying with the Court's requirements.[4] Railways enjoy a partial exemption in respect of lines, stations, and buildings connected therewith other than dwelling-houses.[5] In the case of housing schemes, local building regulations [6] fall to be disregarded in so far as inconsistent with plans and specifications approved by the Scottish Board of Health; [7] and where the Board are themselves carrying out a scheme, they need not apply for warrant to the Dean of Guild Court.[8]

Subsection (8).—*Legal Issues within the Purview of the Court.*

1007. The Court may be called upon to determine legal issues (*a*) as to the construction of its statutory powers or the extent of its jurisdiction in a question between a private individual and the Procurator-Fiscal or Master of Works, at whose instance the Court has been moved to put its powers into operation; [9] and (*b*) as to the respective rights of the petitioner and respondents in an application for warrant to conduct building operations or form a street. In the latter type of case the questions usually relate to such topics as (1) encroachments beyond boundaries; [10] (2) interference with common property or common interests; [11] (3) servitudes; [12] and (4) infringements of building restrictions,[13] invoked either by the petitioner's superior, or by his co-disponees or co-vassals, alleging a *jus quæsitum* to found thereon. Controversy as to the limits of the Court's powers has centred round two subjects, viz. (1) questions of heritable right, and (2) questions of nuisance.

(i) *Questions of Heritable Right.*

1008. It is well settled that the Dean of Guild Court has no jurisdiction to entertain or determine a competition of title, for such a dispute can only competently be decided in one of the ordinary civil

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[1] *Fraser* v. *Downie*, 1901, 3 F. 881; *Jeffray* v. *Angus*, 1909 S.C. 400.
[2] *Downie* v. *Fraser*, *supra*; *Somerville* v. *Dick*, 1902, 4 F. 965.
[3] *Somerville* v. *Lord Advocate*, 1893, 20 R. 1050; *Mags. of Edinburgh* v. *Lord Advocate*, 1912 S.C. 1085.
[4] *Johnston* v. *Edinburgh Gas Light Co.*, 1885, 12 R. 974.
[5] Burgh Police Acts, 1892, s. 517, and 1903, s. 98 (9).
[6] Housing (Scotland) Act, 1925 (15 Geo. V. c. 15), s. 119.
[7] *Ibid.*, s. 80 (1), (2), (4).
[8] *Ibid.*, s. 80 (3).
[9] *E.g. Smith* v. *Giuliani*, 1925 S.C. (H.L.) 45.
[10] See Boundaries and Fences.
[11] See Common Property and Common Interest.
[12] See Servitudes.
[13] See Building Restrictions.

courts.[1] But to create a true competition of title, two parties must both lay claim to the same subject and produce in support of their claims a *prima facie* title.[2] The Dean of Guild must take the titles as he finds them, and cannot entertain the question whether restrictions or qualifications ought to be introduced by implication into titles in themselves unambiguous and unrestricted.[3] Equally, if an essential plan or other adminicle of the titles is lost, the Dean of Guild need not (though he probably can) investigate the question by taking secondary evidence.[4] But all other matters involving merely the construction of titles, possessory points,[5] or "surveyor's questions" [6] must be determined by the Dean of Guild Court, however intricate and difficult they may be; and the Court of Session will not countenance the evasion of difficulties in such cases by the simple expedient of sisting the petition to await the result of an action.[7] A sist is, however, the appropriate step when a true competition of title arises.[8] The Dean of Guild cannot authorise the diversion of an access.[9]

(ii) *Questions of Nuisance.*

1009. For the purpose of carrying out their statutory duties, the Court may often have to consider the use to which a proposed building is intended to be put; and in every case it is competent for them to have regard to structural or sanitary features of buildings which may later prove objectionable or injurious to adjoining occupiers or to the public. Apart from such considerations, however, the Court have now [10] no concern with the effect upon neighbours of the use to which a building may be put,[11] and cannot competently determine *ab ante* whether a building, when actually put to use, will constitute a common law nuisance.[12] To this rule a vaguely defined exception is recognised "where certain types of works have been ticketed by law as nuisances"; [13] and it has recently been decided that the Court may entertain questions arising out of conventional nuisance clauses occurring in the titles.[14]

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[1] *Pitman* v. *Burnett's Trs.*, 1881, 8 R. 914; *Walker & Dick* v. *Park*, 1888, 15 R. 477; *Macandrew* v. *Dods*, 1908 S.C. 51.

[2] *Anderson's Trs.* v. *Gardiner*, 1903, 5 F. 1226; *Wilson* v. *Mackay's Trs.*, 1895, 23 R. 13; *Nicolson* v. *Glasgow Asylum*, 1911 S.C. 391.

[3] *Walker & Dick* v. *Park*, *supra*.

[4] *Macandrew* v. *Dods*, *supra*.

[5] *Smellie* v. *Thomson*, 1868, 6 M. 1024.

[6] *M'Ewan* v. *Shaw Stewart*, 1880, 7 R. 682; *Greenock Police Board* v. *Shaw Stewart*, 1896, 23 R. 776.

[7] *Nicolson* v. *Glasgow Asylum*, *supra*.

[8] *Wilson & Sons* v. *Mackay's Trs.*, 1895, 23 R. 13.

[9] *Moyes* v. *M'Diarmid*, 1900, 2 F. 918.

[10] Originally the Court exercised a wide jurisdiction in questions of nuisance. See, *e.g.*, *Fleming* v. *Ure*, 1750, Mor. 13159; *Carrubbers Close* v. *Reoch*, 1762, Mor. 13175.

[11] *Colville* v. *Carrick*, 1883, 10 R. 1241.

[12] *Manson* v. *Forrest*, 1887, 14 R. 802; *Robertson* v. *Thomas*, 1887, 14 R. 822; *Wyllie* v. *Dunnett*, 1899, 1 F. 982.

[13] *Kirkwood's Trs.* v. *Leith & Bremner*, 1888, 16 R. 255.

[14] *Botanic Gardens Picture House* v. *Adamson*, 1924 S.C. 549.

Section 4.—Procedure.

Subsection (1).—*Unopposed Petitions.*

1010. The procedure in the Dean of Guild Court is still formally regulated by a series of Acts of Sederunt passed in the early part of last century,[1] and, though these have long since fallen into desuetude, their continued force was inferentially recognised in the Act of 1892.[2] In practice, the forms of the Sheriff Court have been in general use, and this practice was confirmed by the Act of 1903.[3] The petition by which proceedings are initiated must contain the particulars, and be accompanied by the plans, prescribed by the Act.[4] A petitioner, in order to have a sufficient title to sue, need not actually be infeft, a personal right to the lands being all that is required.[5] The town council may by rule prescribe, *inter alia*, upon whom petitions should be served,[6] and it is customary to make the adjoining proprietors respondents, though other parties (*e.g.* the superior) may be able to qualify an interest to be sisted.[7] Service may be made in the manner prescribed by the Act for service of notices.[8] Where a respondent is duly cited whose interest or duty it is to take an objection but who refrains from doing so, the Court cannot take the objection *ex proprio motu*.[9] Where warrant is refused, the Court must specify the grounds of their decision.[10]

Subsection (2).—*Opposed Petitions.*

1011. Objections should always be presented in the form of written answers,[11] and a record should be made up so as to preserve the parties' rights of appeal.[12] It is only exceptionally that a private individual can found as respondent on a statutory restriction of general applicability.[13] The burgh surveyor is the proper party in the normal case to appear in the public interest,[11] but if the town council find it necessary to be directly represented, either as property owners or in some other capacity,[14] they must appoint a law agent other than the town clerk,[15] and in such cases it is advisable that an independent clerk and legal assessor should be appointed *ad hoc*.[16] Proceedings should be conducted as in an ordinary court of law, but where (as in Edinburgh) the members

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[1] See Irons, Dean of Guild Court, p. 350.
[2] Sec. 209.
[3] Sec. 37. See *Jeffray* v. *Angus*, 1909 S.C. 400.
[4] Burgh Police Act, 1892, s. 166.
[5] *Cranston & Elliott* v. *Dobson*, 1899, 2 F. 271.
[6] Burgh Police Act, 1903, s. 38 (4).
[7] *Lawrie* v. *Jackson*, 1891, 18 R. 1154.
[8] Burgh Police Act, 1892, ss. 208, 336.
[9] *Mags. of Edinburgh* v. *Beatson*, 1896, 23 R. 44.
[10] *Lindsay* v. *Duke*, 1898, 25 R. 874.
[11] *Stewart* v. *Marshall*, 1894, 21 R. 1117.
[12] *Allan* v. *Whyte*, 1890, 18 R. 332; *Walker* v. *Lang*, 1891, 18 R. 928.
[13] *Maguire* v. *Smith's Trs.*, 1912 S.C. 410.
[14] Burgh Police Act, 1903, s. 13.
[15] *Ibid.*, s. 36.
[16] *Macbeth* v. *Innes*, 1873, 11 M. 404.

of the tribunal include practical experts, the necessity for a formal proof can often be obviated by an inspection of the ground,[1] the results of which should be fully recorded in the Court's interlocutor. A legal assessor cannot hear parties in the absence of the Court, nor appear as counsel in the Court of Session to defend a judgment of the Court in which he has acted as legal assessor;[2] nor can a member take part in the judgment without having heard parties.[3] Expenses, when awarded, fall to be taxed by the Clerk on the basis of the Sheriff Court table of fees.[4]

SUBSECTION (3).—*Minor Warrants.*

1012. The Court may for a specified period delegate to the burgh surveyor the power of dealing summarily with (1) minor internal alterations, and (2) the erection of water-closets and other offices. Where a councillor is appointed under s. 102 of the Town Councils (Scotland) Act, 1900, to perform the duties of Dean of Guild, such councillor, if the town council so resolve, may take the place of the Burgh Surveyor for the purposes of minor warrants.[5]

SUBSECTION (4).—*Enforcement of Decrees.*

1013. All decrees, warrants, and orders of the Court may be extracted, served, intimated, endorsed, and enforced, both within and outside the burgh, by the same officers and to the same effect as a Sheriff Court decree. Where enforcement is required outside the burgh but within the county in which the burgh is situated, the decree must be endorsed by the Sheriff-Clerk or his depute.[6] Prior to 1903 enforcement of Dean of Guild decrees outside the burgh was impossible.

SUBSECTION (5).—*Appeals.*

1014. Appeals may be taken to either division of the Court of Session within twenty days of the date of the interlocutor, or within six months if extract has not taken place. Procedure is by way of docquet written on the interlocutor sheet, followed by transmission of the process as in a Sheriff Court appeal. In the usual case, appeals are taken on the merits against the Court's final interlocutor; but an interlocutory judgment may be submitted to review in the circumstances provided for in the Court of Session Act, 1810,[7] s. 36. The procedure in regard to appeals is regulated by the Court of Session Act, 1868,[8] ss. 65–80, and C.A.S., D, iii.

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[1] *Russell* v. *Cowpar*, 1882, 9 R. 660; *Summerlee Iron Co.* v. *Lindsay*, 1908 S.C. 754.
[2] *Somerville* v. *Edinburgh Assembly Rooms*, 1899, 1 F. 1091.
[3] *M'Ghee* v. *Moncur*, 1899, 1 F. 594.
[4] Burgh Police Act, 1903, s. 37.
[5] *Ibid.*, s. 40. [6] *Ibid.*, s. 37. [7] 50 Geo. III. c. 112.
[8] 31 & 32 Vict. c. 100; Maclaren's Court of Session Practice, pp. 117, 118, 121, 139, 986.

Section 5.—Ædilic Powers in Counties.

1015. The Dean of Guild Court is a purely burghal institution; but with the growth of populous areas outside burgh boundaries the need has been recognised for powers of regulation in these areas similar to those exercised by the Court in burghs. The Public Health (Scotland) Act, 1897,[1] empowered the local authority of any district other than a burgh to make bye-laws, with the approval of the county council, for regulating (1) the building or rebuilding of houses or buildings, (2) the use for human habitation of any building not previously so used, and (3) any increase in the number of occupancies in a building, in respect of such matters as drainage, ventilation, and stability. Under the Housing, etc. (Scotland) Act, 1919,[2] the exercise of this power was made compulsory instead of optional, and the necessity for the consent of the county council was abolished. At the same time the matters in respect of which bye-laws might be enacted were extended to include many of the topics dealt with in the Burgh Police Acts, such as open spaces, protection against fire, number of storeys in tenements, means of access, and approval of plans prior to commencement of building operations. County authorities are thus now vested with powers approximately co-extensive with the statutory jurisdiction of a Dean of Guild Court.

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[1] 60 & 61 Vict. c. 38, s. 181; see *Hope Dunbar* v. *Kirkcudbright County Council*, 1922, J.C. 21.

[2] 9 & 10 Geo. V. c. 60, s. 43.

DEAN OF THE CHAPEL ROYAL.

See CHURCH.

DEATH.

See CRIME (PUNISHMENT); INSURANCE (LIFE); MANDATE; PARTNERSHIP; PRESUMPTIONS; REGISTRATION OF BIRTHS, DEATHS, AND MARRIAGES.

DEATH, REGISTRATION OF.

See REGISTRATION OF BIRTHS, DEATHS, AND MARRIAGES.

DEATHBED.

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Section 1.—The Doctrine of Deathbed.[1]

1016. The law of Scotland from its jealousy of the weakness and facility of mankind while under sickness considered that a man who was technically on deathbed was not competent to make a disposition of his heritable property to the injury of his heir-at-law. "The doctrine of the law of deathbed was that the heir of the person who granted a deathbed deed had a right to set it aside on the ground that it was to his prejudice in his character as heir."[2] The deed was said to be challenged or reduced *ex capite lecti*.

Section 2.—Effect of 1871 Act.

1017. By an Act of 1871[3] it is enacted, "That no deed, instrument or writing made by any person who shall die after the passing of this Act shall be liable to challenge or reduction *en capite lecti*." As the Act only preserves the right of action to the heirs of testators who died before 16th August 1871, the law of deathbed is now merely of historical interest. It has been doubted whether the Act applied to gifts in fraud of legitim, made without writing, by delivery of money or securities.[4] It must be noticed too, that this question arose after the opinion had twice been hazarded on the bench that the case then before the Court would be the last judgment on a point of deathbed law.[5]

Section 3.—Requisites of Deathbed.

1018. It is essential to the plea of deathbed that the deceased should at the date of the deed have been ill of the disease of which he died.[6]

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[1] See Stair, iii. 4, 28 *et seq.*; Ersk. iii. 8, 95; Bell's Prin., s. 1786.

[2] *Wyllie* v. *M'Bride*, 1890, 18 R. 218, per Lord Justice-Clerk Macdonald at p. 222.

[3] 34 & 35 Vict. c. 81.

[4] *Hay* v. *Coutts' Trs.*, 1890, 18 R. 244.

[5] *Gray* v. *Gray*, 1872, 10 M. 854, per Lord Justice-Clerk Moncreiff at p. 858: *Wyllie* v. *M'Bride*, *supra*, per Lord Rutherfurd Clark at p. 223.

[6] *Cogan* v. *Lyon*, 1834, 12 S. 569, per Lord Justice-Clerk Boyle at p. 572.

The presumption of sickness did not hold if death was due to a supervening disease or accident.[1] It was not necessary to allege or instruct that the deceased was at the date of the deed suffering from mortal disease,[2] or that he was then bedfast.[3] There was a strong presumption of sickness if the deceased had kept the house. At one time this presumption was so strong that where he lived a year and a half after the deed in question, and was only hindered from coming abroad by a palsy, and did all his affairs within doors as formerly, it was found that the deed was struck at *ex capite lecti*;[4] and similarly in a case where the defunct attended to not only all his own affairs, but trysted for others, and lived two years and a half after the disposition, and was in like condition as he had been seven years before.[5]

Section 4.—Liege Poustie.

1019. In opposition to the presumption of deathbed was the state of health known as liege poustie. The term is supposed to be a corruption of *legitima potestas*, a person in health having the lawful power of disposing *mortis causa* or otherwise of his heritage, without the deed being subject to challenge under the law of deathbed. Here there was a counter presumption of strength to resist importunity notwithstanding illness at the date of the deed. There were two alternative tests for establishing this presumption: (i) Survival for Sixty Days; (ii) Going to Kirk or Market unsupported.

Subsection (1).—*Survival for Sixty Days.*

1020. On a consideration of the inexpediency of continuing a testator's disability, irrespective of the period of his survivance, it was enacted by Scots Act, 1696, c. 4, that as to all deeds made after that statute, it should be sufficient defence against the objection of deathbed, that the granter lived sixty days after executing the deed, though during that time he neither went to kirk nor market; but that such deeds should still be reducible on proof that, by the sickness of which he died, the granter was not, at the time of executing them, of sound judgment and understanding. There is a presumption—but a *presumptio juris* only—that sickness, having once been contracted, has continued till death, laying the burden of probation on the party alleging convalescence.

Subsection (2).—*Going to Kirk or Market.*

1021. The ordinary and unquestionable defence against deathbed, as proving either that there was no disease, or that convalescence had

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[1] *Mackay* v. *Davidson*, 1831, 5 W. & S. 210, per Brougham L.C. at p. 226.
[2] *Shaw* v. *Gray*, 1624, Mor. 3208 and 3291.
[3] *Robertson* v. *Fleming*, 1622, Mor. 3290.
[4] *Riddel* v. *Richardson*, 1637, Mor. 3212.
[5] *Clieland* v. *Clieland*, 1672, Mor. 3305.

supervened if there had been a disease, was the going freely to kirk or market unsupported, especially if the going abroad was principally to hear sermon, or for devotion, or about affairs to the market. It was not necessary to prove that the defunct went both to kirk and market unsupported; either was sufficient.[1] If the going to kirk or market was clearly established, it was not a relevant objection that the purpose of going was of design to validate the deed. By Act of Sederunt, 29th February 1692, it was declared that the going to kirk or market must "be performed in the daytime, and when people are gathered together in a church, or churchyard, for any public meeting, civil or ecclesiastic, or when people are gathered together in the market-place for public market." It was Lord Stair's opinion that there might be equivalents for going to kirk or market, such as going on a far journey; but these acts were not to be measured merely by the equivalent amount of strength they inferred, as they lacked the exposure to public view and the probation of unprepossessed witnesses available from attendance at kirk or market.

Section 5.—Deeds Liable to Challenge.

1022. "The law of deathbed entitles the heir-at-law to set aside all deeds executed to his prejudice by the deceased *in lecto*. . . . He is entitled to have the heritage of his ancestor free of all deeds executed to his prejudice on deathbed." [2] These deeds might primarily affect moveables; still they prejudiced the heir, by reducing the fund from which creditors are paid before having recourse against heritage.[3] The deeds need not be gratuitous, but "when heritage is sold on deathbed for a price instantly paid, the heir has been found entitled to reduce the sale only on repeating the price to the purchaser." [4] A disposition of heritage in consideration of a personal debt formerly incurred, was reducible, however, without an offer to repeat.[2] A deed executed on deathbed, merely exercising a power conferred on the defunct, and not done in virtue of his ownership, was not reducible. "The heir cannot complain of any exercise of a faculty which has been granted to another person in addition to another lesser state which has been granted to him, because he is not the heir of the person who is executing the instrument." [5] It is to be noted that a "right to challenge by a party's heir is one of which the renunciation is not easily to be inferred." [6]

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[1] *Balmerino* v. *Coupar*, 1671, Mor. 3305.
[2] *Gray* v. *Gray*, 1872, 10 M. 854, per Lord Cowan at p. 860.
[3] *Shaw* v. *Gray*, *supra*; *Cowie* v. *Brown*, 1707, Mor. 3220.
[4] *Gray* v. *Gray*, *supra*, per Lord Justice-Clerk Moncreiff at p. 859.
[5] *Hay Newton* v. *Hay Newton*, 1870, 8 M. (H.L.) 66, per Lord Hatherley at p. 70; *Morris* v. *Tennant*, 1853, 15 D. 716; *Wyllie* v. *M'Bride*, 1890, 18 R. 218.
[6] *Richardson* v. *Richardson*, 1848, 10 D. 872, per Lord Justice-Clerk Hope at p. 878.

Section 6.—Title to Challenge.

1023. "By the law of Scotland, a deathbed deed is set aside, under certain restrictions, either at the instance of the heir of the maker of the deed, or the heir of provision to that person"; [1] unless in the case of an heir of provision who is a stranger, a general power has been reserved by his author to dispone at any time in life. "This is obvious in principle, the stranger disponee is bound to hold good any power reserved against him; if such power be only executed, he cannot complain." [2] A mere beneficiary under a settlement had no title to challenge *ex capite lecti*. He must be a true heir of provision under a direct conveyance of heritage. As a beneficiary under a settlement, "his right and interest is moveable, and attachable by arrestment. Such parties are not heirs of provision in heritage, in any sense of the term." [3] On the death of the nearest heir, without homologating the deed made *in lecto*, the next heir had the right to challenge, even though the deed did not prejudice the deceased heir.[4] An apparent heir, whose title was not completed, was entitled to challenge; [5] and the creditors of an heir had also the right.[6] The Crown, as *ultimus hæres*, could exercise the challenge.[7]

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[1] *Cogan* v. *Lyon*, 1830, 4 W. & S. 391, per Brougham L.C. at p. 393.
[2] *Craufurd* v. *Coutts*, 1806, 5 Pat. 73, per Eldon L.C. at p. 95.
[3] *Shaw* v. *Campbell's Exrs.*, 1847, 9 D. 782, per Lord Justice-Clerk Hope at p. 789.
[4] *Kennedy* v. *Arbuthnot*, 1722, Mor. 3198; *Irvine* v. *Tait*, 1808, Mor. App. "Deathbed," 6.
[5] *Grahame* v. *Grahame*, 1779, Mor. 3186.
[6] Ersk. iii. 8, 100.
[7] *Goldie* v. *Murray's Trs.*, 1753, Mor. 3183.

DEATHBED EXPENSES.

See EXECUTOR.

DEBATE ROLL.

See PRACTICE AND PROCEDURE

DEBATING SOCIETIES.

See CRIME.

DEBENTURES AND DEBENTURE STOCK.

See COMPANY; PUBLIC COMPANY.

DEBITA FUNDI.

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Section 1.—Definition.

1024. *Debita fundi* are debts attaching to the soil, such as feu-duties and proper casualties of superiority, which possess that character *ex lege*; and taxed compositions payable to superiors, and debts or money burdens heritably secured, including ground-annuals, which acquire the character *ex contractu*. The right to these feu-duties, debts, and others creates a lien over the lands, and the superior or creditor is entitled to recover them by an action of poinding of the ground. A superior or creditor, in order to have a good title to sue an action of poinding of the ground, must have a real right; thus a superior who has parted with his right cannot poind the ground for arrears of feu-duty.[1]

The chief *debita fundi* are noted in the succeeding paragraphs.

Section 2.—Feu-duty.

1025. The *reddendo*, or annual return by a vassal to his superior in feu-holdings, consisting of money, produce, or services, is *debitum fundi*. The vassal was also personally liable for it until a new vassal entered;[2] and he is still so liable until a new vassal has been impliedly entered, and notice of change of ownership has been given in terms of the Conveyancing Act, 1874.[3] The superior has also the remedy of the irritancy *ob non solutum canonem*, but not that of an action of maills and duties.[4] This disability also applies to the creditor in a bond and disposition in security of a superiority.[5] Feu-duties do not bear interest *ex lege* until a judicial demand for payment, but after

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[1] *Scottish Heritages Co.* v. *North British Property Investment Co.*, 1885, 12 R. 550.
[2] *Hyslop* v. *Shaw*, 1863, 1 M. 535.
[3] 37 & 38 Vict. c. 94, s. 4 (2).
[4] *Prudential Assurance Co.* v. *Cheyne*, 1884, 11 R. 871.
[5] *Nelson's Trs.* v. *Tod*, 1896, 23 R. 1000.

such a demand interest runs *ex mora*.[1] It would appear, however, that if the feu contract stipulates for interest at a specified rate, an action for interest without a judicial demand would be good;[2] and where the sum due is payable out of a consigned fund, bank interest will be due from the date of consignation.[3] Interest is now invariably stipulated for under the feu-rights. Arrears of feu-duties are extinguished, year by year, by the long prescription. Arrears are not claimable after a decree of declarator of irritancy *ob non solutum canonem*.[4] The delivery of a charter by progress, without reservation of by-past feu-duties, formerly implied a discharge of these,[5] and the same result would probably now follow the granting of an unqualified receipt for relief duty or composition to a vassal impliedly entered under the Conveyancing Act, 1874.

1026. Many feu-rights stipulate for a performance of certain services in lieu of a money payment. It was provided[6] that, where for a period of five years money had been accepted in lieu of services, it was incompetent thereafter to demand the services. Provision[7] was made that on the motion of superior or vassal these services could be valued and a money payment fixed in their stead; this money payment becomes *ex lege* a feu-duty. After 1st January 1935 these services which have not been commuted are to be abolished.[8] In feus granted after 1st October 1874 the annual feu-duty must be of fixed amount or quantity (*e.g.* of grain), and the same applies to any periodical addition to or reduction of the feu-duty.

Section 3.—Proper Casualties of Superiority.

1027. The Feudal (Casualties) Scotland Act[9] makes it incompetent to stipulate for anything but a fixed annual sum in any feu charter given after the passing of the Act, but until 1930 casualties incident to feus granted prior to the Act may still be recovered, and future casualties redeemed either by a lump sum payment or by an additional annual sum added to the feu-duty. Casualties of superiority, so far as still existing are (*a*) casualties of relief and (*b*) casualties of non-entry. A casualty of relief was the payment by the heir of a deceased vassal of an additional feu-duty over and above the feu-duty of the year and was exigible on his entry. The casualty is only exigible in feu-rights created prior to the Conveyancing (Scotland) Act 1874[10] or stipulated for prior to the passing of that Act,[11] and even in such feu-rights it was after 1874

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[1] *Marquis of Tweeddale* v. *Aytoun*, 1842, 4 D. 862; *Maxwell's Trs.* v. *Bothwell School Board*, 1893, 20 R. 958; *Tweeddale's Trs.* v. *Earl of Haddington*, 1880, 7 R. 620.

[2] *Blair's Trs.* v. *Payne*, 1884, 12 R. 104; *Maxwell's Trs.* v. *Bothwell School Board*, *supra*.

[3] *Pollock* v. *Mags. of Edinburgh*, 1862, 24 D. 371.

[4] *Mags. of Edinburgh* v. *Horsburgh*, 1834, 12 S. 593.

[5] *Tailors of Glasgow* v. *Blackie*, 1851, 13 D. 1073.

[6] Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), s. 20.

[7] *Ibid.*, ss. 20 and 21.

[8] Conveyancing (Scotland) Act, 1924 (14 & 15 Geo. V. c. 27), s. 12 (7).

[9] 4 & 5 Geo. V. c. 48 s. 18.

[10] 37 & 38 Vict. c. 94, s. 23.

[11] *Ibid.*, s. 24.

competent to the parties to redeem future casualties.[1] A casualty of non-entry was a duty payable when the heir or singular successor failed to take up the investiture since implied entry was introduced in 1874;[2] this casualty is of little more than historic interest, but questions may yet arise as to casualties due in respect of a period prior to 1874. See CASUALTIES OF SUPERIORITY.[3]

SECTION 4.—TAXED COMPOSITION.

1028. Erskine[4] states the doctrine broadly, that the feu-duty and all other rights of superiority, where the superior is not in possession of the lands themselves, are *debita fundi* or real burdens affecting the fee, and that an action of poinding of the ground lies at the superior's instance for payment of them. As regards the composition of a year's free rent payable on the entry of singular successors, an opposite view has been maintained, namely, that it is not a proper casualty of superiority, and therefore not payable out of the lands, or a real burden on these.[5] A taxed composition payable at regular intervals is, however, undoubtedly *debitum fundi*: and it has been held by a majority of the Court that a taxed composition, payable on the death of a vassal and the entry of a singular successor, being a reserved right of the superior and a condition of the grant, is so.[6]

SECTION 5.—DEBTS OR MONEY BURDENS HERITABLY SECURED.

1029. These may consist of (*a*) Real Money Burdens; (*b*) Sums Secured by Bond and Disposition in Security; (*c*) Ground-annuals; (*d*) Annuities and Annual Rents.

SUBSECTION (1).—*Real Money Burdens.*

1030. Real money burdens may be created either by reservation or by constitution. The requisites to their proper creation are: (1) the creditor must be named or sufficiently identified; (2) the sum must be specific; (3) the burden must be imposed on the lands; (4) it must appear in the dispositive clause; and (5) it must enter and be kept up in the record.[7] As already indicated, the creditor has the right of poinding the ground; but he cannot enter into possession, and has no title to sue an action of maills and duties until he has led an adjudication. See BURDENS.

SUBSECTION (2).—*Sums secured by Bond and Disposition in Security.*

1031. This is the chief form of security for money advanced, and of the burden by constitution. The principal requisites are: (1) that the obli-

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[1] 37 & 38 Vict. c. 94, s. 15. [2] *Ibid.*, s. 4 (2). [3] Vol. III, p. 89, *ante*.
[4] ii. 5, 2. [5] *Sterling* v. *Ewart*, 1844, 3 Bell's App. 128.
[6] *Morrison's Trs.* v. *Webster*, 1875, 5 R. 800.
[7] *Coutts* v. *Tailors of Aberdeen*, 1840, 1 Rob. App. 296.

gation must be definite as to the creditor and the amount; (2) that the lands are disponed in appropriate form in security; (3) that the bond is duly recorded in the appropriate Register of Sasines, or that infeftment has followed thereon; and (4) that the amount has been advanced prior to recording or infeftment. There is a statutory form of bond and disposition in security.[1] As a superior cannot recover his feu-duties by action of maills and duties, so a creditor in a heritable security over a superiority has no title to sue an action of maills and duties against his debtor's vassal.[2] The form of security for money to be advanced is: (*a*) a cash-credit bond limited to a definite sum specified in the bond and three years' interest at five per cent.[3] or (*b*) an *Ex facie* Absolute Disposition. A debt secured by the latter is not *debitum fundi* in the sense here used, and the creditor cannot proceed by poinding of the ground.[4] A loan secured by bond and assignation in security of a long lease recorded in the Register of Sasines, under the Registration of Leases Act, 1857, is not *debitum fundi*, and does not warrant a poinding of the ground.[5] See Bond; Absolute Disposition.

Subsection (3).—*Ground-annuals.*

1032. These are annuities (generally perpetual, but sometimes redeemable) from lands, and are or were usually resorted to (1) where subinfeudation was prohibited; (2) in burgage property which, previous to the Conveyancing Act of 1874, could not be feued by the proprietors, as distinguished from the magistrates; and (3) in connection with building speculations. Ground-annuals are constituted (1) by reservation—that is, by disponing the property subject to a reserved real burden; most frequently, however, (2) by contract of ground-annual containing, on the one hand, a disposition to the purchaser, and, on the other, an obligation to pay the ground-annual, and a disposition of the same furth of the subjects, and of the subjects themselves in security; and also (3) occasionally by bond for a ground-annual and disposition in security. Generally, the rules above indicated apply to these several modes of constitution. The title is completed, in the case of constitution by reservation, by the infeftment of the disponee; in the case of the contract, by the recording of that deed, with two warrants of registration thereon; and, in the case of the bond, by recording it on behalf of the grantee. The distinctions between a feu-duty and a ground-annual are: (1) that the latter must enter and be kept up in the record as a real burden; (2) that, apart from stipulation, the personal obligation originally undertaken will not transmit against a singular successor;[6] and (3)

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[1] Titles to Land Consolidation (Scotland) Act, 1868 (32 & 33 Vict. 116), Sched. FF, and s. 219, as amended by 14 & 15 Geo. V. c. 27, s. 25.

[2] *Nelson's Trs.* v. *Tod*, 1896, 23 R. 1000.

[3] 19 & 20 Vict. c. 91, s. 7; *Morton* v. *Hunter's & Co.*, 1834, 4 W. & S. 379.

[4] *Scottish Heritable Security Co.* v. *Allan Campbell & Co.*, 1876, 3 R. 333.

[5] *Luke* v. *Wallace*, 1896, 23 R. 634.

[6] *Marshall's Tr.* v. *Macneil & Co.*, 1888, 15 R. 762.

a ground-annual secured by disposition in security may be recovered by action of maills and duties. A proprietor of a ground-annual is entitled, after his debtor's sequestration, to poind the ground for the current half-year's "interest on the debt," and one year's arrears.[1] See GROUND ANNUAL.

SUBSECTION (4).—*Annuities.*

1033. Annuities heritably secured, and annual-rents after infeftment, are *debita fundi.*

SECTION 6.—BURDENS WHICH ARE NOT DEBITA FUNDI.

1034. Some of these have been noticed, and the following may be added: Teinds are *debita fructuum* merely, and stipend is a burden on the teinds; land-tax is not *debitum fundi*; nor do parochial, ecclesiastical, or public burdens or assessments bear that character. Land-tax leviable within a burgh is, however, in a different position, and poinding may follow a refusal to pay.[2]

SECTION 7.—COMPETITION AMONG DEBITA FUNDI.

1035. In case of a competition, feu-duties and casualties rank preferably, and those *debita fundi* arising *ex contractu* rank according to the dates of the registration of the infeftments. A right of superiority is a permanent heritable estate. The other *debita fundi* are transmitted and extinguished in the same manner as heritable securities, and, with the exception of ground-annuals, are (unless otherwise destined) moveable as regards succession.[3]

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[1] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), s. 114.
[2] *Renfrew and Brown* v. *Mags. of Glasgow*, 1861, 23 D. 505.
[3] 32 & 33 Vict. c. 116, s. 117.

DEBTOR, DECEASED.

See SEQUESTRATION.

DEBTORS (SCOTLAND) ACT, 1880.

See BANKRUPTCY; IMPRISONMENT FOR DEBT; SEQUESTRATION.

DECIMÆ DEBUNTUR PAROCHO.
DECIMÆ GARBALES.
DECIMÆ RECTORIÆ.
DECIMÆ VICARIÆ.

See TEINDS.

DECK CARGO.

See CARRIAGE BY SEA.

DECLARATION BY PRISONER.
DECLARATION, DYING.

See CRIME (PROCEDURE).

DECLARATOR.

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Section 1.—Definition.

1036. A declaratory action is one in which some right, either of property, of servitude, of status, or some other inferior right, is sought to be declared in favour of the pursuer, but where nothing is demanded to be paid or performed by the defender.[1] Decree in a declarator proper confers no new right; it merely declares that an antecedent right was in the pursuer; it has therefore a retrospective quality, going back to the date at which the right commenced; but many declaratory decrees do not possess this quality.[2] Examples of simple declarators are: declarators of marriage, of expiry of the legal, of irritancy, of bastardy. Formerly a simple declarator, speaking generally, had to be brought in the Court of Session. Now, however, the Sheriff's jurisdiction extends to and includes actions of declarator, with these exceptions, viz. actions of declarator of marriage or nullity of marriage, and actions the direct or main object of which is to determine the personal status of individuals.[3]

Section 2.—Competency.

1037. Declaratory actions are designed for the purpose of making clear that which is doubtful, and which it is necessary to make clear. They are not intended to establish truisms, nor to set up a right which is not attacked.[4] Thus a declarator of an abstract proposition without any legal consequences is incompetent.[5] Again, a declarator must be concerned with a particular case and not with a general proposition.[6] The pursuer must have an interest in the right sought to be declared. It is not, however, necessary that the right sought to be declared should be an immediate right. Thus, a declarator of a future [7] or contingent

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[1] Ersk. iv. 1, 46; Stair, iv. 3, 47.

[2] Ersk. iv. 1, 46.

[3] Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51), s. 5 (1).

[4] *Mags. of Edinburgh* v. *Warrender*, 1863, 1 M. 887, per Lord Neaves at p. 896; *Drennan* v. *Associated Ironmoulders of Scotland*, 1921 S.C. 151.

[5] *Gifford* v. *Trail*, 1829, 7 S. 854; *Lyle* v. *Balfour*, 1830, 9 S. 22.

[6] *Callender's Cable Co.* v. *Glasgow Corporation*, 1900, 2 F. 397, per Lord Adam at p. 401; *Rothfield* v. *North British Rly. Co.*, 1920 S.C. 805.

[7] *Provan* v. *Provan*, 1840, 2 D. 298, per Lord Moncreiff at p. 300; *Fleming* v. *M'Lagan*, 1879, 6 R. 588.

right [1] may be made the subject of an action of declarator. But in such cases all parties interested, or who may become interested, must be called, otherwise the action will be dismissed.[2] Again, the Court has refused to listen to a declarator of a right before the facts emerge on which the right depends.[3] But more recently a less strict view has been taken, and where all the parties presently interested concur in seeking a judgment, or where their interests are subject to defeasance only on a practically impossible event, a declarator *ab ante* may be entertained by the Court.[4]

1038. An action of declarator in the abstract as to the meaning of an Act of Parliament, separate from and independent of any consequent right in the pursuer, or any practical object or purpose, is incompetent.[5] On the other hand, an action to declare the meaning of a statute in its application to a particular person [6] or a particular subject [7] may be competently brought. A declarator of the rules of assessment applicable to particular subjects is competent, either *ab ante* when it is manifest that the assessment is to be made in a particular manner, or after the assessment has been actually imposed.[8] Where, however, the pursuer had not exhausted his statutory rights of appeal against an entry in the Valuation Roll, an action for declarator that he was not a tenant or occupier in the sense of the Lands Valuation Acts and was not liable to be rated or assessed as such was held to be incompetent.[9] Where the statutory procedure in making up the Valuation Roll has not been followed, an action of reduction of the entry in the roll and a declarator of the proper entry is competent.[10]

1039. There is no incompetency in an action of declarator asserting a negative, provided a practical question or dispute lies beneath it.[11]

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[1] *Mackenzie's Trs.* v. *Mackenzie's Tutors*, 1846, 8 D. 964.

[2] *Fleming* v. *M'Lagan*, 1879, 6 R. 588; *Smith* v. *M'Coll's Trs.*, 1910 S.C. 1121; *Murray* v. *Murray*, 1909, 1 S.L.T. 122; *Blair* v. *Kerr's Trs.*, 1919, 56 S.L.R. 205; 1919, 1 S.L.T. 125; *Gillespie* v. *Riddell*, 1908 S.C. 628; affd. 1909 S.C. (H.L.) 3; *Allgemeine Deutsche Credit Anstalt* v. *Scottish Amicable Life Assurance Society*, 1908 S.C. 33.

[3] *Earl of Galloway* v. *Lord Garlies*, 1838, 16 S. 1212; *Millar* v. *Millar's Trs.*, 1896, 4 S.L.T. 122.

[4] *Chaplin's Trs.* v. *Hoile*, 1890, 18 R. 27; *Falconar Stewart* v. *Wilkie*, 1892, 19 R. 630, per Lord Kyllachy at p. 635, and Lord Kinnear at p. 642; *Davidson* v. *Davidson*, 1906, 14 S.L.T. 337.

[5] *Todd* v. *Burnet*, 1854, 16 D. 794; *Hogg* v. *Parochial Board of Auchtermuchty*, 1880, 7 R. 986; *Orr* v. *Alston*, 1912, 1 S.L.T. 95.

[6] *Hogg* v. *Parochial Board of Auchtermuchty, supra.*

[7] *Leith Police Commrs.* v. *Campbell*, 1866, 5 M. 247; *British Fisheries Society* v. *Mags. of Wick*, 1872, 10 M. 426, per Lord Cowan at p. 431; *Glasgow City and District Rly. Co.* v. *Mags. of Glasgow*, 1884, 11 R. 1110; *Norfor* v. *Aberdeenshire Education Authority*, 1924 S.C. 590.

[8] *Edinburgh and Glasgow Rly. Co.* v. *Meek*, 1849, 12 D. 153; *Miller* v. *Gordon*, 1859, 21 D. 975; *Scottish North-Eastern Rly. Co.* v. *Gardiner*, 1864, 2 M. 537; *British Fisheries Society* v. *Mags. of Wick*, 1872, 10 M. 426; *Parochial Board of Bothwell* v. *Pearson*, 1873, 11 M. 399; *Hope* v. *Mags. of Edinburgh*, 1897, 5 S.L.T. 195.

[9] *Dante* v. *Assessor for Ayr*, 1922 S.C. 109.

[10] *Moss Empires* v. *Assessor for Glasgow*, 1916 S.C. 366; affd. 1917 S.C. (H.L.) 1.

[11] *North British Rly. Co.* v. *Birrell's Trs.*, 1918 S.C. (H.L.) 33, per Lord Dunedin at p. 47.

Section 3.—When Declarator necessary.

1040. In certain cases declarator of a right is necessary before an action with petitory or possessory conclusions can follow. It may be laid down generally, that where a right is not clear, either in its nature or extent, a declarator will be necessary.[1] In adjudications, a declarator of expiry of the legal is necessary to render the right of the adjudger irredeemable.[2] Prior to 1874 forfeiture of the feu for non-entry required an action of declarator of non-entry, but by the Conveyancing (Scotland) Act of that year it was provided that no lands should be deemed to be in non-entry, and an action of declarator and for payment of any casualty exigible was substituted for the earlier form of action.[3] Irritancy of the feu requires declarator.[4] Where an heir of entail has incurred an irritancy a declarator of the irritancy is necessary, either under a separate action of declarator or under a combined action of declarator of irritancy and of reduction, before the contravening heir's titles can be reduced.[5] As to leases, speaking generally, legal irritancies require declarator; [6] conventional irritancies do not.[7] But, in conventional irritancies, the condition of the irritancy must be reasonable, if it is to be enforced without declarator, and where the irritancy is unusual, or where it is exceptionally severe, or there is a serious question as to the legality or existence of the irritancy, the safe course is to proceed by declarator.[8]

1041. When a right is claimed against long, adverse possession, a declaratory conclusion must precede any possessory conclusion in the action.[9] An action of division of common heritable property by one of several *pro indiviso* proprietors against the other proprietors must possess a declaratory conclusion. Wherever an action is founded on a trust, it may be necessary to bring a declarator of the trust, in order that the trustee may prove his right against the truster or his representative; and an action of reduction of an *ex facie* absolute and onerous deed on the ground that it was in trust only and gratuitous must contain conclusions declaratory of the trust,[10] at all events in a question between the truster and the trustee.[11] Where it is desired to shew that facts and

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[1] *Cruickshank* v. *Irving*, 1854, 17 D. 286, per Lord Pres. M'Neill at p. 289; *Duke of Argyll* v. *Campbeltown Coal Co.*, 1924 S.C. 844, per Lord Pres. Clyde at p. 852.

[2] See Adjudication, Vol. I. para. 352.

[3] Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), s. 4 (4).

[4] Bell's Prin., s. 701 (6).

[5] *Bontine* v. *Dunlop*, 1823, 2 S. 106 (O.E. 115).

[6] Hunter, Landlord and Tenant, ii. 134; Rankine on Leases, 3rd ed., p. 533 *et seq.*

[7] *Gordon* v. *Copeland*, 1805, Mor. *voce* "Tack," App. 11; *Hall* v. *Grant*, 1831, 9 S. 612; Mackay's Manual, p. 378.

[8] *Wylie* v. *Heritable Securities Investment Association*, 1871, 10 M. 253; *Duke of Argyll* v. *Campbeltown Coal Co.*, 1924 S.C. 844; Mackay's Manual, pp. 79 and 378.

[9] *Grierson* v. *School Board of Sandsting and Aithsting*, 1882, 9 R. 437; *Lord Lovat* v. *Fraser*, 1845, 8 D. 316.

[10] *Anstruther* v. *Mitchell and Cullen*, 1857, 19 D. 674.

[11] *Lord Elibank* v. *Hamilton*, 1827, 6 S. 69.

circumstances go to prove marriage or legitimacy, a declarator is required: or where, on the other hand, the opposite is sought to be shewn, a declarator of putting to silence is necessary. See LEGITIMATION; MARRIAGE.

DECLARATORY ADJUDICATION.

See ADJUDICATION.

DECLINATURE.

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Section 1.—Definition and Applicability.

1042. Declinature is the term applied to the privilege which a party to an action has of declining the jurisdiction of the judge in the action, because the judge has an interest in the case, either financially or otherwise, or is related to one of the parties. It is not a form of defence, but rather "an express refusing to make defences; for it is an intimation by the defender to the Court, or a protestation entered there, that he does not acknowledge its jurisdiction, nor think himself bound to appear before it."[1] As it is an invidious matter for a party to state such an objection, it is the accepted practice for the judge to state it himself. But declinature by a party is not unknown, *e.g.* where the party alleges corruption in the judge.[2]

1043. The question whether a judge is disqualified from sitting in a case is determined not by himself, but by the rest of the Court.[3] If there is no quorum in his absence a judge otherwise disqualified may sit.[4] The rules as to declinature apply to judges sitting in the House of Lords.[5] They also apply to judges of all inferior Courts, for the statutory disqualification arising from relationship was extended from the judges of the Court of Session to these by a later Act.[6] They apply both in civil and in criminal cases.

Section 2.—Interest.

1044. The rules regarding declinature on the ground of interest are based on the common law, with some modification from modern statutes. The general rule has been set forth in these terms: "The general and

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[1] Ersk. Inst. iv. 1, 67.

[2] *Duke of Athole* v. *Robertson*, 1869, 8 M. 299.

[3] *Blair* v. *Sampson*, 26th January 1814, F.C. (1814–15, High Court of Justiciary, App. 501).

[4] *Hercules Insurance Co.* v. *Hunter*, 1837, 15 S. 800, at p. 805.

[5] *Dimes* v. *The Proprietors of the Grand Junction Canal and Ors.*, 1852, 3 H.L.C. 759; *London and North-Western Rly. Co.* v. *Lindsay*, 1858, 3 Macq. 99, at p. 114.

[6] Act, 1681, c. 79 (record edition), c. 13 (12mo edition).

salutary rule is that no man can be a judge in his own cause, and that rule within certain limits is rigorously applied. The reason of it is obvious, viz. to ensure not merely that the administration of justice shall be free of bias, but that it shall be beyond suspicion. It is subject, however, to qualifications and exceptions. The result of the authorities which were cited to us may be stated as follows: (1) As a general rule a pecuniary interest, if direct and individual, will disqualify, however small it may be. (2) An interest although not pecuniary may also disqualify, but the interest in that case must be substantial. (3) Where the interest which is said to disqualify is not pecuniary, and is neither substantial nor calculated to cause bias in the mind of the judge, it will be disregarded, especially if to disqualify the judge would be productive of grave public inconvenience."[1]

Subsection (1).—*Financial Interest.*

1045. As regards financial interest, "the circumstance of a judge being proprietor, or holding shares of the capital stock of a chartered bank in Scotland is not a ground of disqualification against his Lordship judging in questions connected with the bank, or wherein it may have an interest."[2] Further, "it shall not be deemed a ground of declinature of jurisdiction that the judge (whether in the Court of Session or in any of the inferior Courts) is a partner in any joint stock company carrying on as its sole or principal business the business of life and fire or life assurance, where such company is a party to the proceeding in which the judge is called to exercise his jurisdiction; and it shall not be deemed a ground of declinature of jurisdiction that any such judge is possessed, merely as a trustee, of any stock or shares in any incorporated company, where such company is a party to the proceedings."[3] It is a disqualification that a judge is an ordinary director of a bank, but not that he is an extraordinary director.[4]

1046. A judge must still be deemed disqualified on the ground of financial interest who holds a share in his own right in any company other than a chartered bank or a joint life and fire or life assurance company, or who holds a share even as trustee in any unincorporated company. Such restrictions have been denounced both in the House of Lords[5] and in the Court of Session, where Lord Justice-Clerk Inglis described them as "irrational and absurd."[6] The difficulty can, however, always be evaded by the parties lodging a joint minute, in which they waive any objection. This power of waiver distinguishes between disqualification from interest and disqualification from relationship, which cannot be waived.

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[1] *Wildridge* v. *Anderson*, 1897, 25 R. (J.) 27, at p. 34; 2 Ad. 399.
[2] A. of S., 1st February 1820.
[3] Court of Session Act, 1868, 31 & 32 Vict. c. 100.
[4] *Bank of Scotland* v. *Ramsay*, 1738, 5 Bro. Supp. 206.
[5] *London and North Western Rly. Co.* v. *Lindsay*, 1858, 3 Marg. 99.
[6] *Borthwick* v. *Scottish Widows' Fund*, 1864, 2 M. 595, at p. 613.

SUBSECTION (2).—*Interest other than Financial.*

1047. When the interest is not financial it must be substantial in order to disqualify. Where a judge is trustee to one of the parties the declinature will be sustained.[1] Similarly, where the Junior Lord Ordinary was one of the curators to a petitioner the Court remitted the petition to the next Junior Lord Ordinary.[2] Again, where the Lord Ordinary was an essential witness in the cause the Court remitted to another Lord Ordinary.[3]

1048. Declinature was refused in the following cases: where judges were members of a board of trustees whose officers, acting under the authority of the board, were parties to the case;[4] where in a question whether a parish was liable in support to a pauper a judge held property in the parish;[5] where the judge was one of the commissioners of supply who were defenders;[6] where it was possible that a similar case might arise in the future in which the judge would be personally involved[7] (it would, however, be a disqualification if a similar question were pending to which the judge was a party);[8] where the Lord President of the Court of Session proponed a declinature on the ground that he was Chancellor of Edinburgh University, in a case where trustees were directed to found certain bursaries in the University;[9] where a justice of the peace sat on the bench of justices for the granting of licences, being trustee on a sequestrated estate, part of which consisted of a public-house business;[10] where a magistrate, who was the proprietor of an inn in a burgh, was held not to be thereby disqualified from acting as a licensing magistrate in an application having reference to other premises in the burgh;[11] where a magistrate, being *ex officio* trustee of a public library, was held not to be disqualified from acting as judge in a complaint at the instance of a public prosecutor against a person accused of wilfully causing damage to the furniture of the library;[12] where a man was charged with illegally removing sand which the magistrates of a burgh claimed for the burgh, and one of the magistrates tried the case;[13] where three members of the Sanitary Committee of a Town Council authorised the prosecution of an offence under the Public Health Act and then sat on the bench to try the case;[14] where subscribers to an association for reducing the number of public-house licenses acted as members of a licensing appeal court;[15] and where the magistrate who tried a case

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[1] *Martin* v. *Heritors of Kirkcaldy*, 1840, 15 F.C. 362, at p. 379.
[2] *Cuninghame, Petr.*, 1867, 6 M. 120.
[3] *Clarke* v. *Wardlaw*, 1845, 7 D. 268.
[4] *Blair* v. *Sampson*, 26th January 1814, F.C.
[5] *Gray* v. *Fowlie*, 1847, 9 D. 811.
[6] *Lord Advocate* v. *Edinburgh Commrs. of Supply*, 1861, 23 D. 933, at p. 944.
[7] *Belfrage* v. *Davidson's Trs.*, 1862, 24 D. 1132.
[8] Stair, iv. 39, 14.
[9] *Sibbald's Trs.* v. *Greig*, 1871, 9 M. 399, at p. 403.
[10] *Lundie* v. *Mags. of Falkirk*, 1890, 18 R. 60.
[11] *Houston* v. *Ker*, 1890, 28 S.L.R. 575.
[12] *Wildridge* v. *Anderson*, 1897, 25 R. (J.) 27; 2 Adam 399.
[13] *Downie* v. *Fisherrow Harbour Commrs.*, 1903, 5 F. (J.) 101.
[14] *Rae* v. *Hamilton*, 1904, 6 F. (J.) 42.
[15] *Goodall* v. *Bilsland*, 1909 S.C. 1152.

where the accused were charged with a contravention of the Licensing Act had been one of the defenders in an action of declarator and reduction in the Court of Session at the instance of the accused.[1]

1049. A special ground of declinature, where the interest is not of a financial nature, may arise where the judge who is to try the cause has been of counsel in it at an earlier stage in the proceedings. In an early case the Court refused to call upon a judge to give his vote who declined in these circumstances.[2] And although in later cases it was held that the fact that a judge, before being raised to the bench, had been of counsel in the case is no ground for declinature,[3] yet the more recent practice would seem to support the view that declinature in such cases should be sustained.[4] Where a Sheriff-Substitute gave advice in a cause raising the same question which had already been decided by another Sheriff-Substitute, the Sheriff held that this was not a sufficient ground for declinature.[5]

Section 3.—Relationship.

1050. Declinature based on relationship is statutory. At an early period the Scottish Parliament enacted that no judge of the Court of Session should sit or vote in any case in which he happened to stand in the relationship of father, brother, or son to either of the litigants.[6] This prohibition was subsequently extended to the lesser Courts, to affinity in the above relationships as well as consanguinity, and also to cases where the judge is uncle or nephew of either party.[7] Declinature on the ground of relationship has accordingly been sustained in the case of an uncle and his nephew and niece;[8] in the case of brothers-in-law;[9] and in a case where the second son of a claimant had married the judge's daughter.[10] It has been refused where the judge and the litigant had married sisters, this being held to be a mere *affinitas affinitatum*;[11] where the relationship was that of uncle and nephew by affinity;[12] and where the party was grand-niece of the judge.[13] The fact that a near relative of the judge is proprietor of shares in a company which is party to an action is no ground for declinature.[14]

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[1] *Gorman* v. *Wright*, 1916 S.C. (J.) 44.
[2] *Innes' Representatives* v. *Duke of Gordon*, 1827, 6 S. 279, at pp. 294–5.
[3] *King* v. *King*, 1841, 4 D. 124, at p. 127; *Hall* v. *Hall*, 1891, 18 R. 690.
[4] *Free Church of Scotland* v. *M'Rae*, 1905, 7 F. 686; *M'Cardle* v. *M'Cardle's Judicial Factor*, 1906, 8 F. 419.
[5] *Henderson's Trs.* v. *Dunfermline District Committee of Fife County Council*, 1896, 12 S.L. Rev. 58.
[6] Act, 1594, c. 22 (record edition), c. 212 (12mo edition).
[7] Act, 1681, c. 79 (record edition), c. 13 (12mo edition).
[8] *Moubray's Trs.* v. *Moubray*, 1883, 10 R. 460; *Calder* v. *Ogilvy*, 1712, Mor. 197.
[9] *Sir A. Moncrieff* v. *Lord Moncreiff*, 1904, 6 F. 1021.
[10] *Corbet Porterfield* v. *Shaw Stewart*, 1821, 1 S. 9, at p. 10.
[11] *Binny* v. *Hope*, 1687, Mor. 3420.
[12] *Erskine* v. *Drummonds*, 1787, Mor. 2418.
[13] *Gordon* v. *Gordon's Trs.*, 1866, 4 M. 501.
[14] *Spiers* v. *Ardrossan Canal Co.*, 1823, 2 S. 252.

1051. Declinature based on the ground of relationship has been accepted in a series of decisions where the party related to the judge appeared in a representative capacity and not in a case for his own interest. Thus declinatures were sustained where the judge's son was curator to a party;[1] where the judge's brother sued as a commissioner of statutory trustees;[2] and where the judge's sister was married to the mandatary of a party.[3] But since, in cases dealing with interest, it has now repeatedly been held that there is no ground for declinature because the judge himself is the member of a representative body which is a party, it may well be that it would no longer be held a good ground for declinature that a judge is related to one who appears in a representative capacity.

1052. In contradistinction to grounds of declinature based on interest in the judge, the statutory disqualification springing from relationship cannot be removed by waiving the objection.[4] The irregularity arising from relationship between judge and litigant reduces all proceedings in the case to a nullity, and the objection may be propounded even at the last stage of a case.[5]

1053. An objection on the grounds of relationship to the constitution of a valuation committee is not one which can be competently considered by the Valuation Appeal Court.[6]

Section 4.—Criminal Cases.

1054. It is doubtful whether parties can waive their objection to declinature in criminal cases. In a case in the High Court of Justiciary where a railway company was the appellant, two of the judges proponed a declinature on the ground that they were shareholders in the company. The case was continued for hearing by a differently constituted bench, the Lord Justice-General (Robertson) observing that it was doubtful whether it would have been competent for the parties to waive the declinature by joint minute, according to the practice generally competent in the civil courts.[7]

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[1] *Clyne's Trs.* v. *Clyne*, 1847, 19 Sc. Jur. 547.
[2] *Commrs., of Highland Roads* v. *Machray, Croall & Co.*, 1858, 20 D. 1165.
[3] *Campbell* v. *Campbell*, 1866, 4 M. 867.
[4] *Corbet Porterfield* v. *Shaw Stewart*, 1821, 1 S. 9, at p. 10; *Commrs of Highland Roads* v. *Machray, Croall & Co., supra.*
[5] *Ommanney* v. *Smith*, 1851, 13 D. 678.
[6] *M'Gilvray* v. *Assessor for Oban*, 1916 S.C. 665.
[7] *Caledonian Rly. Co.* v. *Ramsay*, 1897, 24 R. (J.) 48; 2 Adam 221.

DECREE.

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Section 1.—Definition.

1055. A decree is the written determination of a judge or judges in a cause. The term interlocutor is employed interchangeably with the term decree.[1] This practice does not seem to be wholly correct; decree appears rather to refer to the matter, and interlocutor to the form of the judgment. The decree is in fact the judgment itself; the interlocutor is the instrument which contains the decree. The word "decern" is essential to make a decree operative.[2] A decree is always asked for in terms of the conclusions of the summons. The opinion has been expressed that statements in the condescendence may be taken as supplementing and explanatory of the conclusions of the summons. Where a pursuer did not crave against three defenders severally, but stated in his condescendence that they were conjunctly and severally liable, and decree in absence went out against them, Lord Young, in considering the decree, observed: "I think one is entitled, in construing a decree, to look to the summons and condescendence." [3]

Section 2.—Interim, Final, and Interlocutory Decrees.

1056. From one point of view decrees may be divided into interim, final, and interlocutory. An interim decree is one containing a final decision, but not dealing with the whole subject-matter of the cause. Thus a decree for payment of a sum of money admittedly or obviously due in an action, where payment of the sum is only one of several conclusions of the summons, is an interim decree.[4] A wife may obtain an interim decree for aliment in a consistorial action; and there may be an interim decree for interdict. In the event of an interim decree pronounced in the Outer House having been implemented, it is lawful for the Court, in any interlocutor recalling or altering such interim decree, to order repayment, or to pronounce warrant *ad factum*

[1] Mackay's Manual, p. 308.
[2] *Anderson* v. *Moon*, 1836, 14 S. 863.
[3] *Milne's Trs.* v. *Ormiston's Trs.*, 1893, 20 R. 523, at p. 531.
[4] *Conacher* v. *Conacher*, 1857, 20 D. 252.

præstandum, or such other order as may be necessary to such recall or alteration.[1]

1057. A final decree, on the other hand, is a decree dealing with the whole subject-matter of the action. A final decree in the Outer House has been thus defined: "It shall be held that the whole cause has been decided in the Outer House when an interlocutor has been pronounced by the Lord Ordinary, which, either by itself or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause; but it shall not prevent a cause from being held as so decided, that expenses, if found due, have not been decerned for." [2] It is considered that a final decree in the Inner House may be similarly defined, except that it must contain a decerniture for expenses.[3]

1058. Interlocutory decrees are decrees which deal with procedure, or which do not dispose of the whole subject-matter of the cause; the term may be an inappropriate one, but it is employed to distinguish a decree which is final and consequently reclaimable without leave, from a decree which, not being final, can only be reclaimed against with leave.[4]

Section 3.—Decrees in Absence; by Default; in foro.

1059. A decree is said to be in absence when it is pronounced (1) without the defender having entered appearance, or (2) where the defender having duly entered appearance has failed to lodge defences within the statutory period. In certain cases, *e.g.* consistorial actions and actions of proving the tenor, decree in absence will not be granted without proof. In actions of reduction the case may be enrolled for the purpose of obtaining an order to satisfy production and thereafter for further procedure; [5] or decree may be taken on the first enrolment in the Undefended Roll *contra non producta*. In actions of adjudication there may be a decree in absence, but only after certain procedure has been followed. A pursuer may, if he desires to record and preserve the evidence, be allowed a proof in an ordinary action, even though the defender has not put in defences and is not present.[6] Generally speaking, however, if a cause be enrolled in the Undefended Roll, the Lord Ordinary must, without the attendance of counsel or agent, grant decree in absence in terms of the conclusions of the summons

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[1] Court of Session (Scotland) Act, 1868 (31 & 32 Vict. c. 100), s. 57.

[2] *Ibid.*, s. 53; see also Sheriff Courts (Scotland) Act, 1876 (39 & 40 Vict. c. 70), s. 3; *Sanderson* v. *Sanderson*, 1921 S.C. 686.

[3] Mackay's Manual, p. 309.

[4] 31 & 32 Vict. c. 100, ss. 28 and 54; Court of Session Act, 1808 (48 Geo. III. c. 151), s. 15.

[5] Mackay's Manual, pp. 211, 212; Maclaren, Court of Session Practice, pp. 686, 687.

[6] *Russel's Trs.*, 1865, 3 M. 850.

or subject to such restrictions as may be set forth in a minute written on the summons. Where there are two or more defenders, and one or more fails to lodge defences, the case should be enrolled in the Undefended Roll for the purpose of getting decree against those failing to lodge defences;[1] but in an action against five defenders conjunctly and severally, where only two of the defenders entered appearance and the case was enrolled for the purpose of obtaining decree in absence against the other defenders, the enrolment was held to be premature and decree in absence was refused.[2] When it is alleged that defences have been lodged on behalf of those called as defenders without their authority, the cause is not an undefended cause though the parties do not at once produce a mandate.[3]

1060. It is not competent to extract a decree in absence before the expiry of ten days[4] and until the account of expenses has been taxed.[5] If expenses are not included in the decree, it is competent to move for them prior to the decree being extracted.[6]

1061. Prior to 1838 if a party desired to be reponed against a decree in absence he had to make his application in the form of a reclaiming note.[7] Between 1838 and 1868 he proceeded by suspension.[8] By the Court of Session Act, 1868, it is provided that if, before the lapse of ten days from the date of a decree in absence, the defender apply for a recall of the decree by enrolling the cause in the Lord Ordinary's Motion Roll (or in Vacation in the Motion Roll of the Lord Ordinary officiating on the Bills), and if, when the cause is called, the defender produces his defences and pays to the pursuer the sum of £2, 2s., the Lord Ordinary shall pronounce an interlocutor recalling the decree in absence and allowing the defences to be received.[9] It would appear reasonable that the Lord Ordinary should have power to dispense with the payment of the £2, 2s. if he thinks fit, but in practice it is usually exacted. If, however, where there has been personal service or where the defender has entered appearance, the ten days have elapsed, and the decree has been extracted and nothing has been done sixty days after the expiry of the charge on it, the party to be reponed must proceed as though the decree was *in foro*.[10] If the ten days have elapsed, but the decree has not been extracted, the defender may have it recalled by reduction; if the ten days have elapsed and the decree has been extracted and a charge has been made, but the sixty days have not expired, he must proceed by suspension. A party can be reponed against a decree in absence pronounced by the Inner House only by appeal to the House of Lords.[11]

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[1] *Duke of Devonshire* v. *Fletcher and Ors.*, 1873, 1 R. 45.
[2] *Symington, Son & Co.* v. *Lorne Shipbuilding Co.*, 1921, 2 S.L.T. 32.
[3] *Fischer & Co.* v. *Anderson*, 1896, 23 R. 395.
[4] Court of Session Act, 1868, s. 23.
[5] 1 & 2 Geo. IV. c. 38, s. 33.
[6] *Williamson* v. *Williamson*, 1860, 22 D. 599.
[7] *Brackenridge* v. *Kenneth*, 1834, 12 S. 654.
[8] Advocations (Scotland) Act, 1838 (1 & 2 Vict. c. 86), s. 5.
[9] 31 & 32 Vict. c. 100, s. 23.
[10] *Ibid.*, s. 24.
[11] Mackay's Manual, p. 212.

1062. A decree by default is a decree pronounced, after the parties have joined issue in a cause, against either of the parties in respect of his failure to obey a peremptory statutory provision or an order of the Court under certification. It is a decree *in foro* and is *res judicata* so long as it subsists.[1] It can only be recalled by reclaiming note, or reduction,[2] for suspension of a decree by default is incompetent.[3] The Court does not necessarily grant decree by default in cases where a party has failed to obtemper an order of the Court, and it is only in extreme cases that the Court will exercise this power, as it is not expedient that a cause should be decided without consideration of the merits;[4] but when a party has failed to conform to the provisions of a statute, the judge has no discretion.[5] Where counsel are absent without good excuse, or where the pursuer fails to deliver printed proofs of the record within eight days after defences are lodged, the judge must pronounce decree by default;[6] and in the former case the party will not necessarily be reponed against this decree, even with consent of his opponent.[7] If the reclaiming days have expired and the decree by default becomes final, it can only be challenged by reduction, unless the days have expired from mistake or inadvertency, in which case "it shall be competent with the leave of the Lord Ordinary to submit the said interlocutor by petition (now by reclaiming note)[8] to the review of the Division," payment of all expenses incurred by the other party being a condition precedent to leave to reclaim being granted.[9] This provision is applicable to cases in the Bill Chamber.[10] When a Lord Ordinary refuses leave under the above section, it is doubtful whether a reclaiming note against his interlocutor refusing leave is competent.[11] A decree by default in the Inner House can only be set aside by appeal to the House of Lords.[12] It is a matter for the discretion of the Court whether a party against whom a decree by default has gone out is to be reponed.[13] Reponing has been refused even on payment of full expenses;[14] on the other hand it may be granted without payment of any expenses at all.[15] A decree by default, being a decree *in foro*, comes under the heading of "Interlocutors disposing in whole or in part of the merits of the cause"; it is therefore reclaimable within twenty-one days.[16]

1063. A decree *in foro* is a decree pronounced in a defended cause. Every decree not in absence is a decree *in foro*. The effect of lodging

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[1] *Forrest* v. *Dunlop*, 1875, 3 R. 15.
[2] *Forrest* v. *Dunlop, supra*; *M'Kean* v. *Lorimer & Moyes*, 1877, 14 S.L.R. 274.
[3] *Maule* v. *Tainsh*, 1878, 6 R. 44.
[4] Mackay's Manual, p. 310.
[5] 31 & 32 Vict. c. 100, s. 26.
[6] A.S., 2nd November 1872; C.A.S., C, ii. 6.
[7] *Ferguson* v. *M'Duff*, 1878, 5 R. 1016.
[8] *Bennet* v. *Pyper*, 1833, 11 S. 414.
[9] Court of Session Act, 1808 (48 Geo. III. c. 151), s. 16.
[10] *Plock* v. *Wallace*, 1841, 4 D. 271.
[11] *Mags. of Leith* v. *Lennon*, 1875, 3 R. 152.
[12] *Tough* v. *Smith*, 1832, 10 S. 619.
[13] *Sutherland* v. *Greig*, 1880, 18 S.L.R. 39; *Bainbridge* v. *Bainbridge*, 1879, 16 S.L.R. 284; *Anderson* v. *Garson*, 1875, 3 R. 254.
[14] *Arthur* v. *Bell*, 1866, 4 M. 841.
[15] *Liqr. of Gael Iron Co.* v. *Orr*, 1884, 12 R. 345.
[16] Court of Session Act, 1850 (13 & 14 Vict. c. 36), s. 11.

defences is that litiscontestation takes place and any decree pronounced thereafter in the cause is a decree *in foro*.[1] Until the lodging of defences any decree pronounced is in absence, even though appearance has been entered.[2] A decree *in foro* is *res judicata* between the parties as to the point decided.[3] Thus when an action is dismissed as incompetent, the decree is *res judicata quoad* competency. A decree *in foro* must be reclaimed against within the specified time, or it has full effect against the parties.

Section 4.—Condemnator, Absolvitor, Dismissal.

1064. A decree of condemnator is a decree upon the merits of the cause pronounced against a defender when he has joined issue with a pursuer. It is in terms of the conclusions of the action and is *res judicata*.

1065. A decree of absolvitor is a decree on the merits in favour of the defender, and unless reversed on appeal is *res judicata* against the pursuer as to the whole subject-matter of the action. It does not, however, prevent the pursuer from raising a new action upon grounds which he omitted to state in his former action, as the plea of "competent and omitted" does not apply to pursuers.[4] Decree of absolvitor may also be pronounced in respect of the failure of the pursuer to conform to a peremptory statutory enactment or to obtemper a peremptory order of the Court. Accordingly, in the following cases, the decree was one of absolvitor: where a pursuer had been ordained to find caution for expenses [5] or to sist a mandatory [6] and had failed to do so; where a pursuer was allowed to amend his record and to proceed with his action only on payment of expenses and he intimated that he did not intend to pay the expenses and proceed with the action; [7] where a pursuer failed to proceed to trial within twelve months of the granting of a new trial.[8] Decree of absolvitor will be pronounced where a pursuer in abandoning a case does not take advantage of s. 10 of the Judicature Act; [9] and also where he abandons under the Judicature Act but fails to pay full expenses.[10] Where a pursuer's statements in a summons are found not sufficient to support the conclusions, it is a competent form of interlocutor to assoilzie the defender "from the conclusions of the action as laid," and this does not prevent another action being brought.[11]

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[1] *Gow* v. *Hendry*, 1899, 2 F. 48, per Lord Young at p. 52.
[2] Court of Session Act, 1868, s. 22.
[3] *Jenkins* v. *Robertson*, 1864, 2 M. 1162; L.R. 1 Sc. App. 117; *Lockyer* v. *Ferryman*, 1876, 3 R. 882.
[4] *M'Donald* v. *M'Donald*, 1840, 2 D. 889; affd. 1 Bell's App. 819; *Phosphate Sewage Co., Ltd.* v. *Molleson*, 1879, 4 App. Cas. 801, per Lord Blackburn at p. 820.
[5] *Gray* v. *Ireland*, 1884, 11 R. 1104; *Cunningham* v. *Skinner*, 1902, 4 F. 1124.
[6] *Train* v. *Little*, 1911 S.C. 736. [7] *Dougall* v. *Caledonian Rly. Co.*, 1913 S.C. 349.
[8] *Smith* v. *Wm. Dixon, Ltd.*, 1910 S.C. 230. [9] *Hare* v. *Stein*, 1882, 9 R. 910.
[10] *Ross* v. *Mackenzie*, 1889, 16 R. 871; *Donnelly* v. *Morrison*, 1895, 2 S.L.T. 582.
[11] *Waterson* v. *Murray & Co.*, 1884, 11 R. 1036.

1066. Decree of dismissal is a decree dismissing the action as laid, but not dealing with the merits of the case so as to prevent them being retried between the same parties. Accordingly, it is the appropriate decree where a plea that the pursuer's averments are irrelevant and insufficient,[1] or that the action is incompetent,[2] is sustained. Decree of dismissal does not form *res judicata*. This has been held even where decree was pronounced in respect of a minute of restriction.[3] In *Stewart's* case Lord Deas observed:[4] "We have had this matter again and again before us, and if there be a distinction established in our practice, it is that the word 'dismiss' is used when it is open to the party to bring another action, and the word 'assoilzie' when it is not open"; and in *Menzies's* case[5] Lord Watson observed that "the dismissal of an action upon relevancy can never be *res judicata*." An action which has been dismissed in the Sheriff Court can never be *res judicata* in an action in the Supreme Court.[6] Decree of dismissal is proper where a pursuer abandons his action under the Judicature Act, 1825.[7] Sometimes an interlocutor, although not using the words "dismisses the action," has been interpreted to mean dismissal; thus where on abandonment the Court assoilzied, it was held that in so far as the interlocutor interfered with the pursuer's statutory right of new action, it should be considered as a clerical error and disregarded.[8] A final decree of condemnator or absolvitor can only be set aside by suspension or reduction.

Section 5.—Decree ad factum præstandum.

1067. An action *ad factum præstandum* is for specific implement or for the performance of a certain act. All obligations may in popular language be said to be of this class, but in strictness the phrase applies to obligations of a particular character. An obligation *ad factum præstandum* is one for the performance of an act within the power of the obligant, and thus a decree of the Court ordering delivery of certain writs would be so termed, as also would a decree charging a superior to enter a vassal to whom he had refused an entry. The difference between an ordinary decree and one *ad factum præstandum* was in former times very considerable. For recovery of a debt the creditor could attach the debtor's estate, heritable and moveable, but an obligation *ad factum præstandum* could be made effectual by letters of horning. Under that form of diligence, if a person was put to the horn for non-performance, he was held to be a rebel, his goods were escheat, and no one could be punished for putting him

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[1] *Menzies* v. *Menzies*, 1893, 20 R. (H.L.) 108, per Lord Watson at pp. 110, 111; *Wallace* v. *Braid*, 1900, 2 F. 754.

[2] *Duke of Sutherland* v. *Reed*, 1890, 18 R. 252.

[3] *Stewart* v. *Greenock Harbour Trs.*, 1868, 6 M. 954.

[4] At p. 958.

[5] *Supra*, at p. 110.

[6] *Govan Old Victualling Society* v. *Wagstaff*, 1907, 14 S.L.T. 716; *Menzies* v. *Menzies*, *supra*; *Duke of Sutherland* v. *Reed*, *supra*; *Wallace* v. *Braid*, *supra*.

[7] 6 Geo. IV. c. 120, s. 10.

[8] *Shirreff* v. *Brodie*, 1836, 14 S. 825.

to death. Letters of horning were afterwards (1584) granted for payment of debt, but the effects formerly resulting from this kind of diligence were abolished by the Act 20 Geo. II. c. 50. There is still this important difference between an ordinary debtor and a debtor under a decree *ad factum præstandum*, that whereas by the Debtors (Scotland) Act, 1880,[1] imprisonment for civil debt has been in the ordinary case abolished, such personal diligence is still competent under a decree *ad factum præstandum*. As to what is considered a decree *ad factum præstandum* on which imprisonment may still follow, see *Mackenzie* v. *Balerno Paper Mill Co.*,[2] where it was held that a decree in an action of count, reckoning and payment ordaining consignation of a sum in the hands of the Court was a decree *ad factum præstandum* which could be enforced by imprisonment.

1068. A decree *ad factum præstandum* should be so expressed that the defender shall be in no doubt regarding the obligation he has to discharge. As has been pointed out, failure to implement such a decree exposes a defender to the penalty of imprisonment, which it is in the power of the pursuer to enforce. There should therefore be no vagueness about the interlocutor.[3] The decree must order the performance of some specified act, as to deliver a specific thing,[4] to consign money,[5] or to execute a deed.[6] As in the case of interdict, the interlocutor should be so framed as to leave no doubt as to the measure of the defender's liability.[3] By s. 91 of the Court of Session (Scotland) Act, 1868, the Court may, upon application by summary petition, order the specific performance of any statutory duty; any decree following thereon would be *ad factum præstandum*.[7] The opinion was expressed in one case by Lord Salvesen that an order for specific performance under this section could competently be pronounced against a Minister of the Crown.[8]

Section 6.—Decree for Expenses.

1069. In pronouncing judgment on the merits of a cause, the Lord Ordinary or the Court should deal with the matter of expenses.[9] What falls to be done in the matter of expenses should be settled before counsel leave the Bar, subsequent to the disposal of the merits.[10] In the House of Lords the custom is to decide the question of expenses when the judges are forming and expressing their opinions on the merits, but this has never been the custom in the Court of Session; parties prefer to

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[1] 43 & 44 Vict. c. 34, s. 4. [2] 1883, 10 R. 1147.

[3] *Middleton* v. *Leslie*, 1892, 19 R. 801.

[4] *Stewart* v. *M'Dougall*, 1908 S.C. 315; *Rudman* v. *Jay & Co.*, 1908 S.C. 552.

[5] *Mackenzie* v. *Balerno Paper Mills*, 1883, 10 R. 1147.

[6] *Taylor* v. *Macdonald*, 1854, 16 D. 378; *Wallace's Curator bonis* v. *Wallace*, 1924 S.C. 212.

[7] *Carlton Hotel Co.* v. *Lord Advocate*, 1921 S.C. 237; *Sons of Temperance Friendly Society*, 1926 S.C. 418.

[8] *Carlton Hotel Co.* v. *Lord Advocate*, *supra*, at p. 249.

[9] 6 Geo. IV. c. 120, ss. 17 and 21.

[10] *Hogg's Trs.* v. *Wilson*, 1869, 6 S.L.R. 285.

have the question, if important, discussed apart from the subject-matter.[1] The Court may grant an interim finding of expenses in any part of the proceedings that stands alone.[2] An interim decree excludes all further claim for expenses upon that particular matter, if the word "modify" be inserted in the interlocutor;[3] if the word "modify" be omitted, the award is regarded as a payment to account only.[4] Decree for expenses in the higher Court carries those in the lower.[5] Adherence to the interlocutor of the lower Court does not give expenses in the higher.[6] A simple decree for expenses implies expenses between party and party.[7] An Inner House interlocutor finding either party entitled to the "expenses of this discussion" does not include the previous expenses in the Outer House,[8] but it does include the expense of the reclaiming note.[9] After final judgment on the merits, it is incompetent in a separate interlocutor to deal with expenses, unless the question has been reserved or expressly left open:[10] except, of course, where the omission is clerical.[11] Decree for expenses generally includes all reasonable and judicial expenses incurred in the case, but not the expense of any particular part or branch of the litigation in which the party has been unsuccessful, or which has been occasioned by unnecessary or improper proceedings. It includes the expense of extract.[12] It covers, as a rule, the expense of the agent attending taxation, and fee to counsel for moving the approval of the Auditor's report.[13] It does not cover diligence on the dependence.[14] Nor does it include the expense of a minute restricting the conclusions of the summons.[15] On this subject generally, see EXPENSES. For right of agent to take decree in his own name, see LAW AGENT; HYPOTHEC.

SECTION 7.—DECREE AS EVIDENCE.

1070. Where a document is the official narrative of acts and proceedings which the law requires to be recorded, parole is excluded.[16] If lost, however, without being extracted, it may be proved by an action of proving the tenor.[17] When brought forward as evidence, a decree cannot be impugned except when challenged on grounds of objection which

[1] *Allan's Trs.* v. *Allan & Sons*, 1891, 19 R. 15.
[2] *Vaughan* v. *Davidson*, 1854, 16 D. 922.
[3] *Viscountess Strangford* v. *Hurlet and Campsie Alum Co.*, 1861, 23 D. 534.
[4] *Cameron & Waterston* v. *Muir & Son*, 1861, 23 D. 535.
[5] *Sinclair* v. *Mossend Iron Co.*, 1855, 17 D. 784; *Darling* v. *Mein*, 1852, 14 D. 347.
[6] *Macdonald* v. *M'Eachan*, 1880, 7 R. 574.
[7] *Fletcher's Trs.* v. *Fletcher*, 1888, 15 R. 862.
[8] *Rose* v. *M'Leay's Trs.*, 1835, 13 S. 964.
[9] *Anstruther* v. *Wilkie*, 1856, 18 D. 405.
[10] *Wilson's Trs.* v. *Wilson's Factor*, 1869, 7 M. 457.
[11] *Walker* v. *Caledonian Rly. Co.*, 1858, 20 D. 1102; but see *Wotherspoon* v. *Macdonald*, 1869, 6 S.L.R. 416.
[12] 13 & 14 Vict. c. 36, s. 29; 16 & 17 Vict. c. 80, s. 14.
[13] *Scott* v. *North British Rly. Co.*, 1860, 22 D. 922.
[14] *Symington* v. *Symington*, 1874, 1 R. 1006.
[15] *Fimister* v. *Milne*, 1860, 22 D. 1100.
[16] Dickson on Evidence, s. 205.
[17] *Duncan* v. *Arnott*, 1827, 5 S. 840.

go, not merely to the regularity of the proceedings, but to the essential justice of the case.[1] A decree may be proved by an extract. Decrees of foreign Courts are admissible, when prepared and authenticated according to the law of the country where they are granted.[2] For how far a decree in one case is conclusive in another, see RES JUDICATA.

[1] Dickson on Evidence, s. 1121 *et seq.*
[2] *Robertson* v. *Gordon*, 15th November 1814, F.C.

DECREE ARBITRAL.

See ARBITRATION.

DECREE COGNITIONIS CAUSA.

See CONSTITUTION, ACTION OF.

DECREE DATIVE.

See CONFIRMATION OF EXECUTORS.

DECREET CONFORM.

See DILIGENCE OF CREDITORS.

DEED OF ARRANGEMENT.

See SEQUESTRATION.

DEEDS, EXECUTION OF.

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Section 1.—Purpose and Effect of Solemnities in Execution.

1071. Deeds, in the widest sense of the term, are writings whereby obligations and rights are legally instructed or proved. To be effective they must be authenticated as the acts of the parties who granted them, and to secure this end our law requires deeds to be executed according to certain prescribed forms. The requisites for the due execution and authentication of a deed [1] are commonly called "solemnities" and were originally introduced into our law by a series of statutes passed between 1540 and 1696.[2] The moving cause of this legislative interference was the prevention of fraud, and the result of it was to bring about the legal conception of a probative deed. A deed executed in accordance with the statutory solemnities is probative—that is, it proves itself, not indeed as being *probatio probata* of its own authenticity, but as producing such a legal presumption of its authenticity that it stands effective in law until reduced. The solemnities are such credentials of its authenticity as to create a legal presumption of its genuineness without any other evidence.[3] A deed, on the other hand, which lacks any of the necessary solemnities is not regarded as the authentic act of the granter and therefore will not receive effect.[4] It will be seen, however, in the sequel that the solemnities required by the early statutes have been

[1] For the requisites in the case of holograph and other privileged or exceptional writings, see para. 1091, *infra*.

[2] 1540, c. 117; 1579, c. 80; 1584, c. 4; 1593, c. 179; 1681, c. 5; 1696, c. 15. See Duff on Deeds, p. 3.

[3] *Ferrie* v. *Ferrie's Trs.*, 1863, 1 M. 291, per Lord Curriehill at p. 298.

[4] Ersk. iii. 2, 19; Bankton, i., 11, 24.

greatly modified by later legislation, and that the effect of their omission can to some extent now be remedied by legal process. But until the necessary steps have been taken, a deed defective in the solemnities has no legal effect; and some defects are incurable. The solemnities are thus the legal tests of the validity of deeds.[1]

Section 2.—Solemnities Required.

Subsection (1).—*Early Legislation.*

1072. The foundation of the law of Scotland regarding the execution of deeds is the solemnities required by the Acts passed between 1540 and 1696, and especially by the Act 1681, c. 5, which substantially codified much that had preceded it. The existing law on the subject consists in the residue of these solemnities which still remains after certain of them have been dispensed with altogether by later legislation and the omission of others has been rendered curable by legal process provided that the deed in question contains certain essentials. It will be necessary therefore first to set forth the solemnities required by the earlier statutes and then to trace the progress and effects of the later remedial legislation.

1073. The solemnities required by the Acts passed between 1540 and 1696 [2] may be summarised as follows:—

(1) Subscription by the granter. This was introduced as a solemnity by the Act 1540, c. 117. Previous to this, sealing was the only mode of authentication in use. Sealing was subsequently dispensed with in certain cases by the Act 1584, c. 4, and it soon fell into general desuetude. The Act of 1540, c. 117, according to its terms appears to have required, in addition to the subscription of the granter, the subscription of at least two witnesses, but it is certain that the subscription of witnesses, if ever observed under this statute, soon fell into disuse.

(2) Name and designation of the writer of the deed to be inserted at the end of the deed. This was introduced as a solemnity by the Act 1593, c. 179.

(3) Subscription by witnesses, who, as well as the writer, must be designed in the deed. This became a solemnity by the passing of the Act 1681, c. 5, which definitely laid it down that only subscribing witnesses should be probative. That statute further enacted that "no witness shall subscribe as witness to any party's subscription unless he then know that party and saw him subscribe . . . or that the party did at the time of the witness's subscribing acknowledge his subscription." [3]

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[1] Menzies, Lectures on Conveyancing (new ed.), p. 80; cf. *Walker* v. *Whitwell*, 1916 S.C. (H.L.) 75, per Lord Dunedin at p. 79.

[2] For the provisions and effect of the individual Acts, see Duff on Deeds, pp. 4–10, and Dickson on Evidence, ss. 639–645.

[3] This provision of the Act of 1681 is still in full force; *Walker* v. *Whitwell*, 1916 S.C. (H.L.) 75.

(4) Deed, if written bookwise, to be signed by the granter on each page where it consists of more than one sheet, pages to be numbered, and number of pages to be mentioned at the end of the deed. These solemnities were required by the Act 1696, c. 15, which first permitted a deed to be written bookwise.

SUBSECTION (2).—*Later Legislation and Present Requirements.*

1074. The foregoing were the statutory solemnities, all of which had to be observed down to the middle of the nineteenth century, if a deed was to be probative or of any valid effect.[1] The relaxations which were sanctioned by later legislation and which determine the present position of the law on this subject were introduced by the following enactments:—

(1) 1856, 19 & 20 Vict. c. 89. Numbering of pages was dispensed with in the case of all deeds past or future. It still, however, remained necessary for each page to be signed by the granter and for the number of pages to be mentioned at the end of the deed.

(2) The Titles to Land Consolidation Act, 1868.[2] All deeds were allowed to be partly written and partly printed or engraved or lithographed,[3] provided that in the testing clause the date, if any, and the names and designations of the witnesses and the number of the pages of the deed, if the number be specified, and the name and designation of the writer of the written portions of the body of the deed shall be expressed at length. This enactment superseded similar enactments contained in the Titles to Land Acts of 1858 and 1860,[4] but abolished with retrospective effect an additional requirement contained in the two last-mentioned statutes requiring the name and designation of the writer of the written portions of the testing clause to be expressed at length in writing. It is to be noticed that this enactment and the two earlier enactments which it superseded introduced a new solemnity in requiring the names of the witnesses to be inserted in the testing clause when the deed was not wholly in writing. The Act 1681, c. 5, had required only the designations of the witnesses to be given in the deed. Mention of the date of the deed, though commonly inserted in the testing clause, has never been an essential solemnity.

(3) The Conveyancing Act, 1874.[5] This Act introduced radical changes into our system of the execution of deeds. Section 38 reduced the number of solemnities which had hitherto been essential for a probative deed, while s. 39 provided a legal

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[1] *M'Farlane* v. *Grieve*, 1790, Mor. 8459; Duff on Deeds, p. 25.

[2] 31 & 32 Vict. c. 101, s. 149.

[3] A deed wholly printed or wholly typewritten is valid. *Simpson's Trs.* v. *Macharg & Son*, 1902, (O.H.), 39 S.L.R. 562; 9 S.L.T. 398, per Lord Kyllachy.

[4] 21 & 22 Vict. c. 76, s. 34; 23 & 24 Vict. c. 143, s. 20.

[5] 37 & 38 Vict. c. 94, ss. 38 and 39.

process whereby a deed which was improbative owing to the omission of certain solemnities might in certain, though not in all,[1] cases be set up as a valid deed.

1075. By s. 38 of the 1874 Act the following solemnities previously essential are dispensed with : (*a*) The name and designation of the writer or printer in the body of the deed or the testing clause; (*b*) specification of the number of pages; and (*c*) the names and designations of witnesses in the body of the deed or testing clause, provided that where the witnesses are not so named and designed their designations be appended to or follow their subscriptions. Such designations may be so appended or added at any time before the deed has been recorded in any register for preservation or founded on in any Court, and need not be written by the witnesses themselves. This did away with the necessity for a testing clause, though the addition of a testing clause is still usual according to modern conveyancing practice. The result of this section has been to reduce the essential solemnities for a probative deed to three in number,[2] namely, (1) subscription by the granter, (2) signature of each page by the granter where the deed is written bookwise and contains more than one sheet, and (3) subscription by at least two witnesses, who are qualified to subscribe in the manner required by 1681, c. 5, and whose designations, if not contained in the body of the deed or in the testing clause, must be added to their subscription. Two witnesses are sufficient for a group of signatures all appended at the same time. This remains as the present law regarding the solemnities required to render a deed probative.

SUBSECTION (3).—*Informalities of Execution which are Curable.*

1076. By s. 39 it is enacted that no deed "subscribed by the granter or maker thereof and bearing to be attested by two witnesses subscribing" shall be deemed invalid or denied effect according to its legal import because of "any informality of execution." The section *ex hypothesi* only applies to a deed which is improbative owing to the omission of some solemnity other than subscription by the granter and two witnesses, but the section expressly lays upon the party upholding such a deed the burden of proving that it was subscribed by the granter or maker thereof and by the witnesses by whom it bears to be attested. The section further prescribes how such proof may be led.

1077. The provisions of ss. 38 and 39 of the 1874 Act are not retrospective and only apply to deeds granted after 1st October 1874.[3] The more important informalities of execution which have been held curable under s. 39 are: omission to sign every page in a deed consisting of more than one sheet ;[4] omission to design the witnesses in the deed, or after their signatures, before the deed has been judicially founded on or

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[1] See *infra*, para. 1077.

[2] *Walker* v. *Whitwell*, 1914 S.C. 560, per Lord Johnston at p. 578 ; *M'Laren* v. *Menzies*, 1876, 3 R. 1151, per Lord Deas at p. 1157.

[3] *Gardner* v. *Lucas*, 1878, 5 R. (H.L.) 105.

[4] *M'Laren* v. *Menzies*, 1876, 3 R. 1151.

registered for preservation ;[1] a blundered testing clause.[2] Omission by the witnesses or one of them to sign until after the deed is judicially founded on, or registered for preservation, is not an informality of execution curable under s. 39;[3] nor does the section apply to a case where the witnesses' signatures were adhibited before the subscription of the granter and where the witnesses neither saw the granter sign nor heard him acknowledge his subscription.[4] Again, subscription by a witness after the granter's death is a fatal defect,[5] and is not curable under s. 39. From certain of the observations in the case last referred to it would appear that s. 39 of the 1874 Act has not altered or in any way dispensed with the qualifications required for subscribing witnesses by the Act 1681, c. 5.[6] Production of a deed in Court in a special application under s. 39 does not amount to a "founding" within the meaning of s. 38 so as to exclude the designations of witnesses being extrajudicially added.[7] If, however, the deed has already been registered for preservation or founded on in Court within the meaning of s. 38 before the witnesses' designations have been added, resort may still be had to s. 39 to cure the defect, as s. 39 does not necessarily refer to different informalities from those dealt with in s. 38.[8]

Except in the matter of notarial execution [9] no change has been made by the Conveyancing Act, 1924, on the law regarding the execution of deeds.

Section 3.—Signatures.

1078. A signature to be valid must be the signer's own act. Thus it is not a valid signature if the hand of the signer be guided or led in the formation of the letters,[10] but assistance which stops short of this, for example, holding the writer's hand about the wrist, would not invalidate the signature.[11] It is not a signature merely to blacken over lines made by another,[12] nor is superscription allowed to take the place of subscription.[13] A signature need not be legible, but a signature by means of a stamp [14] or impressed by a cyclostyle [15] is invalid, and so also is a mere mark.[16] Initials have been held to take the place of full subscription where it was proved that this was the party's usual method of signing,[17] but this holds good only for the granter and not for the witnesses.[18] A

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[1] *Thomson's Tr.* v. *Easson*, 1878, 6 R. 141 ; *Nisbet*, 1897, 24 R. 411.
[2] *Richardson's Trs.*, 1891, 18 R. 1131. [3] *Moncrieff* v. *Lawrie*, 1896, 23 R. 577.
[4] *Smyth* v. *Smyth*, 1876, 3 R. 573 ; cf. *Forrests* v. *Low's Trs.*, 1907 S.C. 1240.
[5] *Walker* v. *Whitwell*, 1916 S.C. (H.L.) 75.
[6] Per Lord Dunedin in *Walker* v. *Whitwell*, 1916 S.C. (H.L.) 75, at p. 83.
[7] *M'Laren* v. *Menzies*, 1876, 3 R. 1151, at p. 1158 ; *Todd* v. *Reid*, 1883, 20 S.L.R. 382.
[8] *Thomson's Tr.* v. *Easson*, 1878, 6 R. 141, at p. 143.
[9] See *infra*, para. 1089.
[10] *Moncrieff* v. *Monypenny*, 1710, Mor. 15936. [11] *Noble* v. *Noble*, 1875, 3 R. 74.
[12] *Crosbie* v. *Picken*, 1749, Mor. 16814. [13] *Foley* v. *Costello*, 1904, 6 F. 365.
[14] *Stirling Stuart* v. *Stirling Crawfurd's Trs.*, 1885, 12 R. 610.
[15] *Whyte* v. *Watt*, 1893, 21 R. 165.
[16] *Crosbie* v. *Wilson*, 1865, 3 M. 870; *Morton* v. *French*, 1908 S.C. 171 ; *Donald* v. *M'Gregor's Exrs.* (O.H.), 1926 S.L.T. 103.
[17] *Spiers* v. *Home Spiers*, 1879, 6 R. 1359. [18] *Meek* v. *Dunlop*, 1707, Mor. 16806.

married woman may sign her maiden name.[1] Signature by the granter of a deed on an erasure does not *per se* render the deed improbative, and, if the deed be otherwise *ex facie* duly tested, the onus will be on the party challenging the deed to prove that the signature was not genuine or had not been duly tested.[2]

Section 4.—Witnesses.

1079. Subscribing witnesses must be qualified in the manner provided by the Act 1685, c. 5; that is, they must either have seen the granter of the deed subscribe or heard him acknowledge his subscription.[3] Persons under fourteen years of age and persons of unsound mind have not the requisite capacity to fulfil the requirements of the Act and are therefore not competent witnesses. Prior to 1868 the competency of women to act as instrumentary witnesses was doubted, but all doubts were removed by the Act passed in that year,[4] the provisions of which in this matter have been held not to be limited to deeds regarding heritage.[5] The competency of a wife attesting her husband's deed is doubtful,[6] but it is at any rate inadvisable that she should do so. Although the Act 1681, c. 5, requires that the witness should "then know" the party subscribing as granter, credible information is enough, and it has been held to be sufficient for a witness to have been introduced to the granter for the first time at the time of the execution of the deed.[7] The attestation of a deed is not necessarily invalidated by the fact that an attesting witness takes benefit under it.[8]

1080. It has been held that the Act 1685, c. 5, does not require the witnesses to subscribe in the presence of the granter. Thus subscription by a witness three-quarters of an hour after the execution of the deed and in another house was held to be regular, the witness having previously heard the granter acknowledge her subscription.[9] The right of a witness to subscribe *ex intervallo* appears to rest on the theory of a continuing mandate, but it has now been definitely decided that the mandate falls by the death of the granter.[10] In the case of a witness who did not see the granter sign it is competent to prove *res gestae*, from which acknowledgment by the granter to the witness may be inferred, and an acknowledgment in any form will suffice.[11] It has also been held that it is not necessary for the two subscribing witnesses to be present at the same time.[12] It is doubtful how far this view would be upheld now, but

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[1] *Dunlop* v. *Greenlees' Trs.*, 1863, 2 M. 1.
[2] *Brown* v. *Duncan*, 1888, 15 R. 511.
[3] *Walker* v. *Whitwell*, 1916 S.C. (H.L.) 75, per Lord Dunedin at p. 83.
[4] 31 & 32 Vict. c. 101, s. 139.
[5] *Hannay and Ors.*, 1873, 1 R. 246.
[6] *Brownlee* v. *Robb*, 1907 S.C. 1302, per Lord Ordinary (Johnston) at p. 1310.
[7] *Brock* v. *Brock*, 1908 S.C. 964.
[8] *Simsons* v. *Simsons*, 1883, 10 R. 1247.
[9] *Thomson* v. *Clarkson's Trs.*, 1892, 20 R. 59.
[10] *Walker* v. *Whitwell*, 1916 S.C. (H.L.) 75, overruling *Tener's Trs.* v. *Tener's Trs.*, 1879, 6 R. 1111.
[11] *Cumming* v. *Skeoch's Trs.*, 1879, 6 R. 963; *Sutherland* v. *W. M. Low & Co.* (O.H.), 1901, 8 S.L.T. 395.
[12] *Hogg and Ors.* v. *Campbell and Ors.*, 1864, 2 M. 848.

it is certainly advisable that the witnesses should sign in presence of the granter and of one another. The granter of an onerous *ex facie* probative deed has been held to be barred from challenging the validity of his deed on the ground that one of the witnesses had neither seen him sign nor heard him acknowledge his signature.[1] Nor in the case of a deed *ex facie* probative will the unsupported testimony of one of the witnesses denying the validity of his attestation suffice to set aside the deed.[2]

Section 5.—Testing Clause.

1081. A testing clause, although usually appended to formal writs and providing a convenient method of authenticating alterations, is not now an essential of a probative deed. All that is necessary is that the deed should be executed in the manner required by the foregoing statutes so far as still extant.[3] It is to be observed that the forms appended to the Conveyancing (Scotland) Act, 1924, end with the words ["to be attested"] instead of "in witness whereof [testing clause]," as was the case with the forms appended to the previous conveyancing statutes.

1082. Words inserted in the testing clause of a deed can have no effect in altering or adding to the provisions of the deed.[4] The testing clause may be filled up after the death of the granter,[5] but not after the deed has been registered for preservation or after it has been produced in judgment.[6] A discrepancy between the signature of a witness and his name as given in the testing clause was held curable under s. 39 of the 1874 Act, and Lord M'Laren questioned whether such a blunder would have invalidated the deed at common law.[7] The erroneous designation of a witness in the testing clause of a deed was held not to invalidate the deed where the meaning was plain from the context.[8] The designation of the witness in the testing clause must, however, be sufficient for identification, but if that be so an error in his name, or the fact that his name was written on an erasure, will not be a fatal defect.[9]

Section 6.—Authentication of Alterations.

1083. Alterations in a deed may consist of (*a*) deletions, (*b*) marginal additions and interlineations, and (*c*) erasures. As a general rule all alterations must be authenticated in some specific manner before effect can be given to them. The usual modes of authentication of alterations are by mention in the testing clause or by the signature or initials of the granter of the deed being written beside the alteration. An unauthenti-

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[1] *Baird's Tr.* v. *Murray*, 1883, 11 R. 153; cf. also *Boyd* v. *Shaw*, 1927 S.C. 414.
[2] *Forrests* v. *Low's Trs.*, 1907 S.C. 1240.
[3] See para. 1075, *supra*.
[4] *Blair* v. *Assets Co.*, 1896, 23 R. (H.L.) 36.
[5] *Veasey* v. *Malcolm's Trs.*, 1875, 2 R. 748.
[6] *Hill* v. *Arthur*, 1870, 9 M. 223; *Millar* v. *Birrell*, 1876, 4 R. 87.
[7] *Richardson's Trs.*, 1891, 18 R. 1131.
[8] *Speirs* v. *Speirs' Trs.*, 1878, 5 R. 923.
[9] *M'Dougall* v. *M'Dougall*, 1875, 2 R. 814.

cated alteration will in general be treated as *pro non scripto*, the presumption being that it was added after the execution of the deed.[1]

Subsection (1).—*Deletions.*

1084. Deletions, *i.e.* words in a deed scored out by lines being drawn through them, will be treated as cancelled and no longer a part of the deed on proof that the cancellation was done by the granter himself, or by his orders, with the intention of cancelling. The authentication of the deletion by the initials of the granter is sufficient evidence of such intention.[2] The intention, however, may be inferred from the facts and circumstances of the case and effect allowed to deletions not authenticated by initials or otherwise.[3] This would appear to be an exception to the general rule requiring all alterations to be specifically authenticated before effect can be given to them. A document cannot be legally deleted merely by pasting another on the top of it.[4] If certain words are scored out and others added in place of them the deletion will not be given effect to unless the added words are properly authenticated.

Subsection (2).—*Marginal Additions and Interlineations.*

1085. Marginal additions and interlineations must be authenticated by the signature or initials of the granter of the deed. This is required even where the marginal addition or interlineation is apparently holograph of the granter.[5] But a holograph addition to a will, written in the space between the end of the will and the subscription, was held to be valid.[6] The interpolation of "not" in the clause of a deed of entail prohibiting the alteration of the order of succession was held to invalidate the entail, as the word was essential and could not be supplied by an interpolation not noticed in the testing clause.[7]

Subsection (3).—*Erasures.*

1086. A word written upon an erasure and not authenticated by being noticed in the testing clause or otherwise will be held *pro non scripto*. If the erasure be *in essentialibus* the deed is vitiated, but if not *in essentialibus* the deed will stand and be given effect to as if the word on the erasure were not in the deed.[8] Where the signature of an *ex facie* probative deed was written on an erasure it was held that the onus of proving that the signature was not genuine was on the party challenging the deed.[9] An objection to a decree of the Commissary Court on the ground

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[1] *Gollan* v. *Gollan*, 1863, 1 M. (H.L.) 65; *Drummond* v. *Peddie* (O.H.), 1893, 1 S.L.T. 189.
[2] *Pattison's Trs.* v. *University of Edinburgh*, 1888, 16 R. 73.
[3] *Milne's Exr.* v. *Waugh*, 1913 S.C. 203; *Allan's Exr.* v. *Allan*, 1920 S.C. 732; but see *Gemmell's Exr.* v. *Stirling* (O.H.), 1923 S.L.T. 384.
[4] *Dunsire* v. *Bell*, 1909 S.C. (J.) 5.
[5] *Brown* v. *Maxwell's Exrs.*, 1884, 11 R. 821.
[6] *Gray's Trs.* v. *Dow*, 1900, 3 F. 79.
[7] *Munro* v. *Johnstone*, 1868, 7 M. 250.
[8] *Gollan* v. *Gollan*, *supra*; *M'Dougall* v. *M'Dougall*, 1875, 2 R. 814.
[9] *Brown* v. *Duncan*, 1888, 15 R. 511.

that the date was written on an erasure was repelled,[1] and so also was a similar objection to the date of a mandate.[2] By the Act 6 & 7 Will. IV. c. 33, instruments of sasine and of resignation *ad remanentiam* (other than *propriis manibus*) were declared unchallengeable on the ground of erasures unless it was proved that the erasures were made fraudulently or that the record was not conformable to the instrument as presented for registration. This Act was extended to all instruments by s. 144 of the 1868 Act and applies to Notices of Title expede in terms of the Conveyancing (Scotland) Act, 1924.[3] A similar provision was made by s. 54 of the 1874 Act with regard to any deed, instrument, or writing recorded in any register of sasines.

Section 7.—Notarial Execution.

1087. The Act 1540 c. 117, which made subscription by the granter before witnesses an essential solemnity for the execution of a deed, also provided for execution by a notary subscribing on behalf of a granter who was unable to write. The Act 1579, c. 80, increased the solemnities of notarial execution and required all deeds relating to heritage or to moveables over £100 Scots to be executed by two notaries and four witnesses, if the granter could not write. Wills of moveable estate, irrespective of amount, appear to have been exempt from these increased solemnities and could be notarially executed by one notary and two witnesses.[4] It is uncertain whether under the Acts of 1540 and 1579 the witnesses to a notarial execution were required to subscribe, but they were so required by the Act 1681, c. 5. That Act also required the granter of a notarially executed deed to touch the notary's pen in token of warrant to subscribe, and this had to be done in presence of the witnesses. The requirement of two notaries and four witnesses for the notarial execution of all important *inter vivos* deeds and the ceremony of touching the pen remained the law until 1874.[5]

1088. By the 1874 Act[6] considerable changes in the requirements for notarial execution were introduced. These may be summarised as follows:—

(1) One notary and two witnesses were made sufficient in all cases. It has always been the law both before and after the 1874 Act that the notary or notaries must have no interest in the deed.[7]

(2) A justice of the peace may act instead of a notary. The form of docquet given in Schedule I. of the Act shews that a parish minister in

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[1] *Dowie* v. *Barclay*, 1871, 9 M. 726. [2] *Muir* v. *Thompson*, 1876, 3 R. (H.L.) 1.

[3] 14 & 15 Geo. V. c. 27, s. 6.

[4] Stair, iii. 8, 34; Ersk. iii. 2, 23; *Campbell* v. *Purdie*, 1895, 22 R. 443, per Lord M'Laren at p. 447.

[5] For an account of the requirements of the law prior to the passing of the 1874 Act, see *Atchison's Trs.* v. *Atchison*, 1876, 3 R. 388.

[6] 37 & 38 Vict. c. 94, s. 41, Schedule I.

[7] *Gormock*, 1583, Mor. 16874; *Ferrie* v. *Ferrie's Trs.*, 1863, 1 M. 291; *Chisholm* v. *Macrae*, 1903, 41 S.L.R. 300; *Newstead* v. *Dansken*, 1918, 1 S.L.T. 136.

his own parish may also act if the deed be a testament. This right of the parish minister was not introduced by the 1874 Act, but is of high antiquity and was recognised in the Act 1584, c. 133.[1]

(3) The ceremony of touching the pen is expressly abolished, but authority must still be conferred on the notary or justice by the granter. The authority must be given before two witnesses and may be given by word or act, it being sufficient for the witnesses either to hear or see the authority given.[2]

(4) The deed must be read over to the granter before execution. The reading over is an essential solemnity, and cannot be dispensed with even, for example, where the granter is deaf. The reader need not be the notary or justice, and it is doubtful whether the latter need be present at the time of the reading.[3] The reading must, however, be in the presence of the witnesses, and the safest course to pursue is to read over everything *verbatim*, though it is not clear whether the section requires more than the body of the deed to be read over. In a case where the docquet stated that the deed "had been gone over and explained" the Court allowed a proof, but Lord Rutherfurd Clark dissented on the ground that the docquet did not comply with the statutory solemnities.[4]

(5) The notary or justice must subscribe in presence of the granter and of the witnesses. The witnesses must also subscribe in the presence of the granter.[5]

(6) A docquet in the form of Schedule I. or in words to the like effect [6] must be adhibited to the deed in presence of the granter as well as of the witnesses. The docquet must be signed by the notary and the two witnesses, but if the docquet be on the same page as the deed or the last part of it the notary does not require to add a separate signature to the deed.[7] The docquet must be holograph of the notary or justice. This has always been necessary, and it was held that the provisions of s. 41 of the 1874 Act did not dispense with the necessity of the docquet being holograph.[8] The form of docquet given in the Schedule includes a declaration by the granter of his inability to write and the reason therefor, and it is thought that this declaration should be made in presence of the witnesses. Lord Kincairney in one case expressed the view that the declaration was not an essential.[3] This, however, is doubtful. The docquet must set forth not only the authority—this was required by the law before 1874—but also that the deed had been read over to the granter in presence of the witnesses.[6] A defective notarial execution under

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[1] *Stephen* v. *Scott*, 1927 S.C. 85, per Lord Sands at p. 91.
[2] See Schedule I. to 1874 Act.
[3] *Hodges* v. *Hodges' Trs.*, 1900, 7 S.L.T. 303.
[4] *Watson* v. *Beveridge*, 1883, 11 R. 40.
[5] *Kissack* v. *Webster's Trs.*, 1894, 2 S.L.T. 172.
[6] *Atchison's Trs.* v. *Atchison*, 1876, 3 R. 388.
[7] *Mathieson* v. *Hawthorns & Co.*, 1899, 1 F. 468.
[8] *Henry* v. *Reid*, 1871, 9 M. 503; *Irvine* v. *M'Hardy*, 1892, 19 R. 458; *Campbell* v. *Purdie*, 1895, 22 R. 443.

s. 41 of the 1874 Act could not be cured by proceedings under s. 39 of the 1874 Act.[1]

1089. Section 41 of the 1874 Act has now been superseded for all deeds granted on or after 1st January 1925 by s. 18 of the Conveyancing (Scotland) Act, 1924.[2] This section substantially re-enacts s. 41 of 1874, but enlarges its scope in two important matters:

(1) A law agent as well as a notary public or justice of the peace may carry out a notarial execution, and in the case of testaments the assistant and successor of a parish minister in his parish may act as well as the parish minister himself. In the case of a law agent it has been held that a duly enrolled law agent who had not taken out the annual certificate authorising him to practise was competent to effect a valid notarial execution.[3]

(2) The provisions of s. 39 of the 1874 Act are expressly made applicable to deeds notarially executed under the 1924 Act.

1090. It should further be noticed that the 1924 Act expressly authorises notarial execution of deeds for blind persons. Under the 1874 Act such persons only got the benefit of notarial execution if they were unable to write by reason of their blindness. A blind person may validly subscribe deeds in the same way as persons not subject to any physical incapacity,[4] but to prevent challenge it is safer that the deeds of such should be executed notarially in terms of s. 18 of the 1924 Act. It may also be noted that s. 18 expressly requires the docquet to be holograph, but, as above stated, this has always been the law with regard to notarial execution.

Section 8.—Holograph and Other Privileged or Exceptional Writings.

Subsection (1).—*Holograph Writings.*

1091. The statutes regulating the authentication of written instruments do not apply to holograph writings.[5] A signed holograph writing is thus effectual without the subscription of witnesses or any other of the statutory solemnities. In the case of testamentary holograph writs it has been definitely decided that in the absence of subscription they cannot receive any effect.[6] In *inter vivos* deeds of a contractual nature an unsigned document may possibly be validated by delivery, *rei interventus*, or homologation.[7] In order that a deed may get the privileges of a holograph writing it is not necessary that it be *verbatim*

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[1] *Kissack* v. *Webster's Trs.*, 1894, 2 S.L.T. 172; but see 14 & 15 Geo. V. c. 27, s. 18 (2).
[2] 14 & 15 Geo. V. c. 27, s. 18, and Schedule I.
[3] *Stephen* v. *Scott*, 1927 S.C. 85.
[4] *Duff* v. *Earl of Fife*, 1823, 1 Sh. App. 498.
[5] *Macdonald* v. *Cuthbertson*, 1890, 18 R. 101, per Lord Kinnear at p. 108.
[6] *Taylor's Exrs.* v. *Thom*, 1914 S.C. 79; *Foley* v. *Costello*, 1904, 6 F. 365.
[7] *Weir* v. *Robertson*, 1872, 10 M. 438; *Taylor's Exrs.*, *supra*, per Lord Johnston at p. 85.

holograph; it is enough if the essentials are in the granter's writing.[1] What are the essentials is a question of fact.[2] A holograph writing is not probative,[3] and if it do not bear *in gremio* that it is holograph the party founding on it must prove that it is so. It is not enough to prove that the deed and signature are in one handwriting, but it must be proved that it is the writing of the alleged granter.[4] If, however, the writing bear *in gremio* to be holograph, the onus of shewing that it was not so is on the challenger,[5] and accordingly such a holograph writing is practically as probative as if it had been attested by witnesses. Holograph writings do not prove their own dates except in the case of testamentary writings [6] and acknowledgments of intimations of assignations.[7] Holograph documents importing an obligation fall under the vicennial prescription introduced by the Act 1669, c. 9, with the effect that after the lapse of twenty years from its date the document requires to have its authenticity proved by the debtor's oath.[8]

Subsection (2).—*Wills.*

1092. The authentication of testamentary instruments of British subjects is regulated by the Wills Act, 1861,[9] which provides:

(1) The will of a British subject made out of the United Kingdom is effectually executed as regards personal estate if made according to the forms of (*a*) the place of execution, (*b*) the testator's domicile at the time of execution, or (*c*) the laws of the part of the British Empire where he had his domicile of origin.

(2) The will of a British subject made within the United Kingdom is effectually executed as regards personal estate if made according to the forms of the place of execution.

(3) No change of domicile after execution revokes or invalidates a will or alters its construction.

The Wills Act, 1861, is limited in its scope to wills of personal estate, but by the operation of s. 20 of the 1868 Act its provisions become applicable in Scotland to wills dealing with heritage as well as moveables.[10] The Wills Act is also limited to British subjects, but by the common law of Scotland any will of moveable property executed according to the law of the place of execution is effectual.[11]

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[1] *Christie's Trs.* v. *Muirhead*, 1870, 8 M. 461; *Carmichael's Exrs.* v. *Carmichael*, 1909 S.C. 1387.

[2] *Macdonald* v. *Cuthbertson*, 1890, 18 R. 101.

[3] *Cranston*, 1890, 17 R. 410, per Lord M'Laren at p. 415.

[4] *Anderson* v. *Gill*, 1858, 20 D. 1326; affd. 3 Macq. 180.

[5] *Waddel* v. *Waddel's Trs.*, 1845, 7 D. 605.

[6] 37 & 38 Vict. c. 94, s. 40.

[7] *Earl of Selkirk* v. *Gray*, 1708, Robertson's App. Cas., p. 1.

[8] *Storeys* v. *Paxton*, 1878, 6 R. 293; *Turnbull's Exrx.* v. *Turnbull's Exr.*, 1903, 11 S.L.T. 120; *Macadam* v. *Findlay*, 1911 S.C. 1366.

[9] 24 & 25 Vict. c. 114. ss. 1, 2, 3.

[10] *Connel's Trs.* v. *Connel*, 1872, 10 M. 627; *Studd* v. *Cook*, 1883, 10 R. (H.L.) 53; *Browne*, 1882, 20 S.L.R. 76.

[11] *Purvis' Trs.* v. *Purvis' Exrs.*, 1861, 23 D. 812.

SUBSECTION (3).—*Writs* in re mercatoria.

1093. Mercantile documents used in trade by merchants [1] or parties *pro hac vice* acting as merchants [2] are effectual, although neither tested nor holograph. They may be signed by initials or mark and prove their own dates, at least for their own purposes.

Bills, promissory notes and cheques have the same privileges, but to warrant summary diligence they must be dated and signed. It is uncertain whether an IOU need be holograph or tested.[3] The privileges of writs *in re mercatoria* do not extend to writings unconnected or but remotely connected with trade.[4]

SUBSECTION (4).—*Crown Writs.*

1094. The statutes applicable to the testing of deeds are not applicable to Crown writs. Such writs neither have nor require to have any testing clause.[5]

SUBSECTION (5).—*Deeds by Companies.*

1095. Deeds of companies incorporated under the Companies Acts are validly executed in Scotland if sealed with the common seal of the company and subscribed on behalf of the company by two of the directors and the secretary. Such subscription is equally binding whether attested by witnesses or not.[6] It is usual, however, to attest by witnesses the subscriptions of the directors and secretary. It should be observed that the foregoing statutory provision is merely enabling and not peremptory. A deed therefore executed by an incorporated company in terms of its articles would be validly executed, at any rate so long as its regulations do not conflict with the general law. It is at least doubtful whether a company can by its articles dispense with witnesses. The safest rule in the matter is to follow the terms of the statutory provision above referred to. It is thought that the correct way of carrying out the statutory provision is for the sealing and subscribing to be done altogether at one and the same time at a meeting of the board. In practice considerable laxity prevails in this matter, but the legality of sealing and subscribing at different times and of appending the three subscriptions at different times is open to question. The statutory provision above referred to does not apply to (1) execution in England of a deed by a Scottish company, or (2) execution of a deed by an English company although relating to heritable property in Scotland.

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[1] Bell's Prin., s. 21 ; Bell, Com. i. 342.

[2] *Thoms* v. *Thoms*, 1867, 6 M. 174, per Lord Neaves at p. 177.

[3] *Bowe & Christie* v. *Hutchison*, 1868, 6 M. 642 ; *Paterson* v. *Paterson*, 1897, 25 R. 144.

[4] *Stewart* v. *M'Call*, 1869, 7 M. 544.

[5] *Catton* v. *Mackenzie*, 1874, 1 R. 488 ; see also 25 & 26 Vict. c. 37, s. 6, and 31 & 32 Vict. c. 101, s. 88.

[6] 8 Edw. VII. c. 69, s. 76 (3). This subsection incorporated s. 56 of the Conveyancing (Scotland) Act, 1874. Sec. 56 of the 1874 Act is now repealed.

SUBSECTION (6).—*Quasi-Judicial Writs.*

1096. Orders by arbiters in the course of a reference,[1] the decree of a judicial referee,[2] an opinion of counsel returned on a joint memorial [3] are quasi-judicial acts and as such are regarded as probative without the statutory solemnities.

SUBSECTION (7).—*Special Statutory Relaxations.*

1097. Certain Acts of Parliament allow documents to be attested by one witness. Thus a bill of sale of a ship under the Merchant Shipping Act, 1894,[4] only requires one witness. Again, the Companies (Consolidation) Act provides that shares in a company may be transferred in any manner sanctioned by the articles of the company.[5] The Marriage Notice (Scotland) Act, 1878,[6] authorises writs by persons unable to write to be executed by mark in presence of the registrar, provided that the registrar subscribes a declaration that the mark was adhibited in his presence.

SUBSECTION (8).—*Deeds not of great Importance.*

1098. The statutory solemnities are not required for the execution of deeds relating to moveable estate only and involving not more than £100 Scots.[7]

SECTION 9.—ADOPTION.

1099. An improbative writing may receive the effect of a properly executed deed by the principle of adoption. If the granter of an imperfectly executed writ clearly refers to it in another writ which in itself is valid, he may be held to have adopted the former as his writ by his reference to it in the latter, and such adoption will give validity to the imperfectly executed writ. The clearest instance of adoption is where a party adds to a writing neither holograph nor tested a holograph signed memorandum to the effect that he adopts the foregoing as holograph. It has been held that the words "adopted as holograph" written by the granter after his signature but not themselves signed were sufficient to entitle the Court to regard the whole writ preceding the signature as holograph.[8] Adoption, however, is a matter of intention, and the addition of such words to an improbative writ will not have the effect of making the writ binding where it can be proved that the granter added the words without understanding their effect.[9]

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[1] Dickson on Evidence, s. 790.
[2] *Ibid.*, s. 792.
[3] *Fraser* v. *Lord Lovat*, 1850, 7 Bell's App. Cas. 71.
[4] 57 & 58 Vict. c. 60, s. 24 and First Schedule.
[5] 8 Edw. VII. c. 69, s. 22.
[6] 41 & 42 Vict. c. 43, s. 16.
[7] Ersk. iii. 2, 10–13; *Paterson* v. *Paterson*, 1897, 25 R. 144, per Lord Young at p. 151.
[8] *Gavine's Tr.* v. *Lee*, 1883, 10 R. 448.
[9] *Harvey* v. *Smith*, 1904, 6 F. 511.

1100. Adoption need not be express. Any reference in a separate probative deed which clearly identifies another writing and shews that the granter regarded that other writing as his valid writ will suffice.[1] In a writing partly holograph it is a question to be decided upon the circumstances of each case whether the words which are holograph are sufficient to infer adoption of the non-holograph portion of the writ.[2] In the case of testamentary writings an unsubscribed holograph docquet or backing, though clearly referring to the writings, will not suffice to render unauthenticated writings a valid will by adoption.[3] The principle in such cases appears to be that the docquet incorporates the unauthenticated writings as a schedule or appendix, and that the whole will only be regarded as a valid testament if the docquet is itself properly authenticated—*i.e.* is either a subscribed holograph writing or tested. In one case an unauthenticated holograph writing accompanied by a holograph writing subscribed by initials only was upheld, but there was evidence that initials were the party's usual method of subscription.[4]

1101. Adoption does not necessarily require to be effected by a subsequent deed. It is competent in a probative deed to declare beforehand that subsequent writings, which are clearly indicated, shall have the effect of duly authenticated deeds, although themselves informal and improbative.[5] But such subsequent informal writings will only receive effect where the Court is satisfied that they are of the nature contemplated by the original probative deed.[6] Adoption of a writing may also be inferred from the actings of a party,[7] but the evidence of adoption must be clear and distinct. Mere silence will not suffice,[8] nor will mere constructive knowledge of the writing on the part of the party alleged to have adopted it be sufficient to infer his adoption of it.[9]

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[1] *Mitchell's Trs.* v. *Pride*, 1912 S.C. 600; *Cross's Trs.* v. *Cross*, 1921, 1 S.L.T. 244.

[2] *Christie's Trs.* v. *Muirhead*, 1870, 8 M. 461; *Maitland's Trs.* v. *Maitland*, 1871, 10 M. 79.

[3] *Stenhouse* v. *Stenhouse*, 1922 S.C. 370; *Shiell* v. *Shiell*, 1913, 1 S.L.T. 62.

[4] *Speirs* v. *Home Speirs*, 1879, 6 R. 1359.

[5] *Wilsone's Trs.* v. *Stirling*, 1861, 24 D. 163; *Fraser* v. *Forbes' Trs.*, 1899, 1 F. 513.

[6] *Lamont* v. *Mags. of Glasgow*, 1887, 14 R. 603; *Hamilton's Trs.* v. *Hamilton*, 1901, 4 F. 266.

[7] *Urquhart* v. *Bank of Scotland*, 1872, 9 S.L.R. 508.

[8] *M'Kenzie* v. *British Linen Co. Bank*, 1881, 8 R. (H.L.) 8; *British Linen Co. Bank* v. *Cowan*, 1906, 8 F. 704.

[9] *Muir's Exrs.* v. *Craig's Trs.*, 1913 S.C. 349.

DEFAMATION.

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Section 1.—Introduction.

1102. Defamation is literally the taking away of reputation. In law the term denotes a branch of the law of reparation, and the right which is injured by the act of defamation is the right to "fame, reputation, or honour."[1] In the older law of Scotland, while defamation was justiciable by the Commissary Courts, the remedies given were fine, damages, and palinode (*i.e.* retraction); and in respect of the first of

[1] Stair, i. 9, 4.

these the remedy was *ad vindictam publicam*, and thus of a criminal character. For this reason older writers classify defamation as a crime.[1] Certain forms of defamation still constitute a crime by the law of England, but in Scotland defamation has long been definitely placed in the class of non-criminal wrongs or delicts. The appropriate remedy is therefore an action of damages. In rare circumstances, however, the Courts will grant an interdict against the threatened circulation of defamatory statements. The reluctance to apply this remedy is due to the fact that the adjudication upon a case of defamation is allocated by statute to a jury,[2] and the remedy by interdict deprives the parties of the determination of a jury on the question whether the words complained of are defamatory.[3]

Section 2.—Modes of Defamation.

1103. While the mode of defamation is commonly by words, written or spoken, yet the same wrong may be committed through the medium of signs, pictures, statuary, or actings,[4] or even by silence signifying concurrence in a statement made by another with whom one is collaborating in regard to the matter in connection with which the slander is uttered.[5] No distinction as regards the nature of the wrong is drawn between defamatory words as written and as spoken,[6] and, consequently, apart from questions of evidence arising in connection with the proof, it is not essential to produce the actual writing in order to found an action on written slander.[7] The distinction in English law between slander and libel has no counterpart in the law of Scotland, although a slanderous meaning will be less readily inferred from spoken words than from a deliberately written statement.[8] While the number of persons to whom the communication is made is an important element in assessing damages, a defamatory statement uttered only in the presence of the person defamed, or in a letter sent to and seen by him alone, entitles him to that element (at least) of damages which is called solatium, if the statement is calculated to injure his feelings and is therefore what is properly called a "slander."[9] But a claim for solatium is personal to the party actually defamed, and consequently, in the absence of any

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[1] *E.g.* Ersk. Inst. iv. 4, 80.

[2] There is a statutory exception in the case of an action against a medical man founded on a certificate of lunacy under the Lunacy Acts; see Lunacy (Scotland) Act, 1866 (29 & 30 Vict. c. 51), s. 24.

[3] Bell, Com., 7th ed., i. 111, 112; Cottenham L.C. in *Newton* v. *Fleming*, 1848, 6 Bell's App. 175, at p. 190; *White* v. *Dickson*, 1881, 8 R. 896; *British Legal Life Co.* v. *Pearl Life Assurance Co.*, 1887, 14 R. 818.

[4] *Monson* v. *Tussaud*, [1894] 1 Q.B. 671; *Kennedy* v. *Allan*, 1848, 10 D. 1293; *Drysdale* v. *Earl of Rosebery*, 1909 S.C. 1121; *Adamson* v. *Martin*, 1916 S.C. 319.

[5] *Jack* v. *Fleming*, 1891, 19 R. 1.

[6] *Mackay* v. *M'Cankie*, 1883, 10 R. 537.

[7] *Ellis* v. *National Free Labour Association*, 1905, 7 F. 629.

[8] *Agnew* v. *British Legal Life Assurance Co.*, 1906, 8 F. 422, per Lord M'Laren at p. 429.

[9] *Kennedy* v. *Baillie*, 1855, 18 D. 138; *Mackay* v. *M'Cankie*, *supra*.

reflection upon themselves, the relatives of a deceased person have no claim for solatium in respect of a slander made upon a person after his death.[1] As regards publication by communication to third parties, a slander is not published by merely dictating a letter to a clerk, nor by dispatching a telegram through the hands of Post-Office officials, in the absence of some personal interest which these persons may have or take in the subject-matter of the slander.[2] It is not an answer to an action of damages for defamation that the slander was uttered in answer to a question [3] or was a mere repetition or quotation of what was said by another.[4] And on the other hand a person who repeats or publishes a slander cannot, in ordinary circumstances, be compelled to disclose its author,[5] although in very exceptional cases he may, if this is necessary to establish a material element in the injured party's claim for damages against the publisher.[6]

Section 3.—Foreign Slander.

1104. In order that a slander which is uttered in a foreign country may be actionable in Scotland, it must be a wrong both by the law of the country where it was uttered and by the law of Scotland; [2] but, if it is so, a claim to reparation is to be proved in a Scottish Court in all respects as if the slander had been uttered in Scotland.[7] A slander contained in a sealed letter sent through the Post Office is not uttered at the place where it was posted but at the place where the letter is received and opened.[2] In the case of a slander uttered in a foreign language the pursuer of an action of damages must prove both that the actual (foreign) words alleged were used and that the translation averred by him is a fair English equivalent for the expressions made use of.[8]

Section 4.—Application to Individual.

1105. Sometimes a slander does not *ex facie* necessarily apply to the particular person who maintains that he was injured by it. If it is so expressed that those who read or hear it, with that amount of care which is normal in the circumstances under which it was uttered, might reasonably hold it to be applicable to the pursuer,[9] it is a matter of proof whether it did in fact apply to the pursuer or was applied to him

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[1] *Broom* v. *Ritchie & Co.*, 1904, 6 F. 942.
[2] *Evans & Sons* v. *Stein & Co.*, 1904, 7 F. 65.
[3] *Harkness* v. *The Daily Record, Ltd.*, 1924, S.L.T. 759.
[4] *Marshall* v. *Renwick*, 1835, 13 S. 1127.
[5] *Lowe* v. *Taylor*, 1843, 5 D. 1261; *Morrison* v. *Smith & Co.*, 1897, 24 R. 471.
[6] *Cunningham* v. *Duncan & Jamieson*, 1889, 16 R. 383.
[7] *M'Larty* v. *Steele*, 1881, 8 R. 435.
[8] *Bernhardt* v. *Abrahams*, 1912 S.C. 748.
[9] *Wragg* v. *Thomson & Co., Ltd.*, 1909, 2 S.L.T. 409; *Briggs* v. *Amalgamated Press, Ltd.*, 1910, 2 S.L.T. 298 and 334.

by those who heard or read it;[1] but an action will not lie at the instance of an individual for a slander which is merely a vague and general denunciation of a large class of persons.[2]

Section 5.—Vicarious Slander.

1106. A husband is not liable for a slander merely because it was uttered by his wife;[3] but an employer is liable for defamatory words uttered by his servant in the course of making a statement which it is within the scope of his employment to make on behalf of his master,[4] even when the employer is a corporation;[5] though a master is not liable for defamatory words uttered by his servant, even if they are made in the course of his employment, if the scope of his employment does not include the making of such statements as that in the course of which they were uttered,[6] unless the employer has expressly authorised or adopted the slander, and the onus of proof will be on the pursuer to shew that he has done so.[7] Similar considerations apply to the liability of any person for the uttering of a slander by another person who is not his servant. If the uttering of the particular slander was within the scope of any authority given by the former to the latter,[8] or if it was adopted by him[9] he will be liable, but not otherwise.[10] Conversely, if an agent or employee utters a slander on an occasion which is outwith the course or scope of his employment, and which was not specially authorised by his employer, he cannot plead any defence which is proper to his employer.[11]

Section 6.—Defamatory Implications.

1107. Any false statement or implication of fact which tends to be injurious, and is in fact injurious, to the person regarding whom it is made may found an action for reparation;[12] but the various specific imputations which have actually been held to entitle the injured party to damages may be classified as in the following paragraphs.

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[1] *Selkirk* v. *Rankin*, 1819, 2 Murray 128; *Outram* v. *Reid*, 1852, 14 D. 577; *Browne* v. *Thomson & Co.*, 1912 S.C. 359.

[2] *Wardlaw* v. *Drysdale*, 1898, 25 R. 879.

[3] *Milne* v. *Smiths*, 1892, 20 R. 95.

[4] *Citizens' Life Assurance Co.* v. *Brown*, [1904] A.C. 423; *Ellis* v. *National Free Labour Association*, 1905, 7 F. 629; *Finburgh* v. *Moss Empires, Ltd.*, 1908 S.C. 928; *Cumming* v. *Great North of Scotland Rly. Co.* (O.H.), 1916, 1 S.L.T. 181; *Jardine* v. *North British Rly. Co.* (O.H.), 1923, S.L.T 55.

[5] *Finburgh* v. *Moss Empires, Ltd.*, *supra*.

[6] *Riddell* v. *Glasgow Corporation*, 1911 S.C. (H.L.) 35; *M'Adam* v. *City and Suburban Dairies, Ltd.*, 1911 S.C. 430; *Mandelston* v. *North British Rly. Co.*, 1917 S.C. 442.

[7] *Cameron* v. *Yeats*, 1899, 1 F. 456.

[8] *Ramsay* v. *Nairne*, 1833, 11 S. 1033; *Goodall* v. *Forbes*, 1909 S.C. 1300.

[9] *Jack* v. *Fleming*, 1891, 19 R. 1.

[10] *Adamson* v. *Martin*, 1916 S.C. 319.

[11] *Goodall* v. *Forbes*, *supra*; *Suzor* v. *Buckingham*, 1914 S.C. 299.

[12] *Paterson* v. *Welch*, 1893, 20 R. 744.

SUBSECTION (1).—*Imputations of Crime.*

1108. All imputations of criminal actions are clearly injurious to character and reputation and are therefore defamatory. There is hardly a crime known to the law the false accusation of which has not been made the subject of a claim of damages. And it has been recognised that where a general charge or imputation of having been in prison or "in the hands of the police" implies the conviction for a crime, or a criminal tendency of character, such a charge or imputation will be actionable;[1] but the use of mere slang epithets which also designate crimes is not actionable. Thus to call a man a "fraud," in mere slang abuse, is not slanderous,[2] and there are other epithets of this nature which are sometimes used in slang with an even complimentary implication.

SUBSECTION (2).—*Non-Criminal Imputations on Character and Conduct.*

1109. Outside of the region of criminal actions, there is a large field of imputations on character and conduct in which it is difficult to draw a line between what is injurious to character and reputation, and therefore slanderous, and what is not. Certain classes of accusations imputing serious moral charges give rise to little difficulty. Thus, offences against decency and against sexual morality have been the charges sued on in a large number of reported cases; and even an imputation of "want of proper womanly delicacy" has been held actionable.[3] It is slanderous to attribute to one the authorship of letters expressing criminal or morally offensive views;[4] and it has been held slanderous to say that one is a "scoffer" at religion, and is "morally offensive" in his public addresses,[5] but not to say of another that he called one "a bloody little brute."[6] An implication that one has used a public office for personal gain at the public expense is slanderous.[7]

1110. Charges against a person's honesty or truthfulness are in general actionable; but when words implying such charges are intended only as an emphatic contradiction of a particular assertion, or as immediate comment on a particular course of conduct, or as mere abuse, they are not. Thus, to call a man a "liar" or a "fraud" is not necessarily actionable.[8] More general accusations and terms of vague abuse

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[1] *Lockhart* v. *Cumming*, 1852, 14 D. 452; *Scouller* v. *Gunn*, 1852, 14 D. 920; *Christie* v. *Robertson*, 1899, 1 F. 1155; *Leon* v. *Edinburgh Evening News, Ltd.*, 1909 S.C. 1014; *Adamson* v. *Martin*, 1916 S.C. 319.

[2] *Agnew* v. *British Legal Life Assurance Co.*, 1906, 8 F. 422.

[3] *A. B.* v. *William Blackwood & Sons*, 1902, 5 F. 25.

[4] *Waugh* v. *Ayrshire Post*, 1893, 21 R. 326.

[5] *Macfarlane* v. *Black & Co.*, 1887, 14 R. 870.

[6] *Murdison* v. *Scottish Football Union*, 1896, 23 R. 449.

[7] *Hunter* v. *Ferguson & Co.*, 1906, 8 F. 574; *Langlands* v. *John Leng & Co.*, 1916 S.C. (H.L.) 102.

[8] *Watson* v. *Duncan*, 1890, 17 R. 404; *Agnew* v. *British Legal Life Assurance Co.*, *supra*.

are in a more doubtful position. The tendency of recent decisions has been to discount any injurious implications in such vague expressions in the absence of anything further to give them point in a definitely defamatory sense. Thus it has been held slanderous to say of one that he was a "damned, robbing, swindling rascal," [1] and even, in an early case, that he was a "blackguard"; [2] but, in more recent cases, the expressions "mean," [3] "terrible Zulu," "bloated autocrat," "inflated with vanity," [4] "source of evil," [5] and that one "offered a bribe," [6] were held not to be defamatory. There is, moreover, one important qualification in regard to all such forcible expressions of disapproval. Where the conduct which is the subject of animadversion has been correctly set forth in the statement complained of, the person making the statement will not be held liable in damages for even very strong language in which he may proceed to express his own opinion on such conduct. "The expression of an opinion as to a state of facts truly set forth is not actionable, even when that opinion is couched in vituperative or contumelious language" so long as the comment does not convey imputations of an evil sort which are not warranted by the facts so stated.[7] But a statement which is not slanderous when addressed to the party himself about whom it is made, may, nevertheless, be slanderous if communicated to others who do not know all the surrounding circumstances.[8]

SUBSECTION (3).—*Imputations against Financial Reputation.*

1111. Imputations against a person's financial credit, being clearly injurious to the conduct of business, are actionable; but in this case, as there is no reflection on personal character, solatium appears to be inapplicable, and the damage sued on must be caused by the communication of the defamatory statement to third parties. Thus, a statement made of a solicitor holding appointments of trust that he "has been cleaned out and lost his all" formed a good ground of action.[9] The inclusion of a person's name in a "black list," or list of defaulting debtors and of those against whom decrees in absence have been obtained, may be actionable. The publication of an accurate statement of a decree obtained in absence may not infer liability, since it is merely the narration of what has happened in a Court of Law; [10] but any addition thereto in the form of a caution against giving credit may infer liability; [11]

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[1] *Harkes* v. *Mowat*, 1862, 24 D. 701. [2] *Brownlie* v. *Thomson*, 1859, 21 D. 480.
[3] *Fraser* v. *Morris*, 1888, 15 R. 454.
[4] *M'Laughlan* v. *Orr, Pollock & Co.*, 1894, 22 R. 38.
[5] *Rooney* v. *M'Nairney*, 1909 S.C. 90. [6] *Gardner* v. *Robertson*, 1921 S.C. 132.
[7] *Campbell* v. *Ferguson*, 1882, 9 R. 467; *Archer* v. *Ritchie & Co.*, 1891, 18 R. 719; *Bruce* v. *Ross & Co.*, 1901, 4 F. 171; *Wheatley* v. *Anderson and Miller*, 1927 S.C. 133, per Lords Hunter and Anderson.
[8] *Kennedy* v. *Baillie*, 1855, 18 D. 138, per Lord Justice-Clerk Hope at p. 145, and Lord Curriehill at p. 157.
[9] *A. B.* v. *C. D.*, 1904, 7 F. 22. [10] *M'Lintock* v. *Stubbs, Ltd.*, 1902, 5 F. 1.
[11] *Andrews* v. *Drummond & Graham*, 1887, 14 R. 568.

and, even in the absence of such an express caution, the circumstances of the publication may imply such a warning.[1] Any material inaccuracies in the list, however, which will bear a construction injurious to a person's credit, will render the publisher of the list liable in damages. Thus, there is a material difference between a statement that a decree has been taken in absence and a statement that a decree has been taken *in foro*. "For the latter statement means only that judgment has been given against one of the parties on a controverted question; and the former may be supposed to mean that the defender was unable or unwilling to pay a just debt,without being able to bring forward any reason for his failure to pay." [2] Accordingly, the inclusion in lists of "decrees in absence" of decrees which had in fact been taken *in foro*,[3] and of consent,[4] was held to afford a ground of action. *A fortiori* an action will lie where no decree has in fact been pronounced at all.[5] And a cautionary statement that the inclusion of any name in such a list does not carry a particular implication does not exclude liability even for that particular implication in the case of an entry in the list which is materially inaccurate.[6] The subject of innuendo is dealt with later,[7] but it should be observed in connection with such lists that any statement made in them cannot be innuendoed to infer any wider implication than the statement itself and the circumstances of the publication reasonably imply.[8] Similarly, accurate lists of persons in regard to whom notices of sequestration have appeared in the Edinburgh Gazette are not actionable; but any material inaccuracy, such as the omission of an address, leading to confusion as to the identity of the bankrupt, may afford a ground of action.[9]

Subsection (4).—*Imputations of Unfitness for Trade or Occupation.*

1112. Analogous to the care which the law has for a person's financial credit is its solicitude for a man's repute for competency in his business. If an occupation requires any special skill or proficiency, any person following that occupation will be protected from attacks on his skill. And no less will the law protect a man from the imputation of being negligent in his business, or of violating its recognised etiquette or rules of professional conduct. Thus, to give a few examples from among many others, a soldier may obtain reparation for an allegation that he has failed in his duty as a soldier during an engagement; [10] a doctor, for allegations of professional incompetence, and of persistent

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[1] *Barr* v. *Musselburgh Merchants Association*, 1912 S.C. 174.
[2] Per Lord Kinnear in *Crabbe & Robertson* v. *Stubbs, Ltd.*, 1895, 22 R. 860, at p. 865.
[3] *Crabbe & Robertson* v. *Stubbs, Ltd.*, *supra*.
[4] *Hunter & Co.* v. *Stubbs, Ltd.*, 1903, 5 F. 920.
[5] *Mazure* v. *Stubbs, Ltd.*, 1919 S.C. (H.L.) 112.
[6] *Ibid.*, per Lord Shaw at pp. 119, 120.
[7] Para. 1120 *et seq.*, *infra*.
[8] *Russell* v. *Stubbs, Ltd.*, 1913 S.C. (H.L.) 14.
[9] *Outram* v. *Reid*, 1852, 14 D. 577.
[10] *Gordon* v. *John Leng & Co.*, 1919 S.C. 415.

drunkenness,[1] or of conduct towards his professional brethren inconsistent with the ordinary standards of honour in the profession;[2] a minister of religion for an allegation of conduct unbefitting his office;[3] a school-teacher, for reflections on his teaching abilities;[4] a chemist, for an allegation that he has unwarrantably varied a doctor's prescription;[5] the superintendent of an asylum, for an allegation of incompetence for such a post;[6] the manager of a shop, for an allegation of negligence of business;[7] an innkeeper, for an allegation of gross mismanagement of his hotel;[8] and a solicitor, for an allegation of conducting litigations for his own benefit in disregard for the interests of his clients.[9]

1113. On the other hand, the limits of legitimate artistic criticism are very wide; and so long as the criticism is *bona fide* of the performance, and not made the cover for a personal attack upon the artist or performer, it will give no ground of action.[10] If a person publicly applies for a public appointment it would appear that his qualifications for the post may similarly be criticised without giving any ground of action.[11]

Subsection (5).—*Imputations of Insanity or of Disease.*

1114. It is clearly defamatory to say of a person that he is insane,[12] or that he is suffering from disease if the imputation of disease will bear an innuendo damaging to character.[13] But a diagnosis made by a medical man, whether contained in a certificate of lunacy or otherwise, purports only to be in the nature of an expression of skilled opinion,[14] implying merely the ascertainment with reasonable care and skill of a state of facts sufficient to justify the opinion, and consequently it is not actionable unless the diagnosis was demonstrably wrong and was made without due inquiry and examination.[15] An action will not lie against a medical man for granting a certificate of lunacy under the Lunacy Acts unless it is raised within twelve months of the liberation of the injured party from the asylum, if his incarceration has followed upon the certificate.[16]

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[1] *Balfour* v. *Wallace*, 1853, 15 D. 913.
[2] *Müllar* v. *Robertson*, 1852, 15 D. 170 and 661.
[3] *Mackellar* v. *Duke of Sutherland*, 1859, 21 D. 222; *Lowe* v. *Taylor*, 1844, 7 D. 117.
[4] *M'Kerchar* v. *Cameron*, 1892, 19 R. 383.
[5] *Gall* v. *Slessor*, 1907 S.C. 708.
[6] *Chisholm* v. *Grant*, 1914 S.C. 239.
[7] *Bryant* v. *Edgar*, 1909 S.C. 1080.
[8] *M'Iver* v. *M'Neill*, 1873, 11 M. 777.
[9] *M'Rostie* v. *Ironside*, 1849, 12 D. 74.
[10] *Leslie* v. *Blackwood*, 1822, 3 Murray 165; *Davis* v. *Miller*, 1855, 17 D. 1050; *Crotty* v. *MacFarlane*, 1891, reported in Glegg on Reparation, 2nd ed., p. 614.
[11] *Auld* v. *Shairp*, 1875, 2 R. 940, per Lord Neaves at p. 949.
[12] See, *e.g.*, *Henderson* v. *Henderson*, 1855, 17 D. 348; *Macintosh* v. *Weir*, 1875, 2 R. 877.
[13] See, *e.g.*, *A.* v. *B.*, 1907 S.C. 1154.
[14] See para 1110, *supra*.
[15] *Mackintosh* v. *Fraser*, 1860, 22 D. 421, per Lord Deas at p. 430; *Mackintosh* v. *Weir*, *supra*; *A.* v. *B.*, 1907 S.C. 1154.
[16] 29 & 30 Vict. c. 51, s. 24.

SUBSECTION (6).—*Other Kinds of Injurious Statement.*

1115. The kinds of injurious statement which tend to injure and do in fact injure cannot be limited; but among others which have been held to be actionable the following may be mentioned: to impugn, in connection with a roup, the vendor's title to sell the goods which are exposed;[1] or to impugn a person's right to make and sell specific articles.[2] This is sometimes called "slander of title." It has also been held actionable to say that infectious disease has broken out in a dairy;[3] and to make allegations of faulty structure in houses erected to be sold or let;[4] and, in England, to state untruly that one had ceased to carry on business,[5] or, of a marriageable woman, that she was already married.[6] A form of slander of property which has provided numerous cases in the English Courts is a merchant's depreciation of his rival's goods. But if a person compares his own goods favourably with those of his rival, but makes no false statement as to the character of the latter's goods, no action is maintainable.[7]

1116. It may also be actionable, apart from legitimate criticism of the public acts of those engaged in public life,[8] to ascribe to people conduct which, while implying no moral turpitude, exposes them to public ridicule or hatred and contempt;[9] but in this, as in other cases of defamation,[10] it is essential that the allegations as to their conduct should be false.[11]

SECTION 7.—FAIR RETORT.

1117. A person is entitled to make publicly a fair retort in self-defence to charges publicly made against him, even if in so doing he makes statements which are defamatory of the person who made the charges, and such statements are not actionable[12] unless they go beyond the matters dealt with in the charges made against him.[13]

SECTION 8.—FAIR COMMENT.

1118. Fair comment on actual facts, since it is not a false allegation of fact but a mere expression of judgment or opinion, is not actionable, however injurious or damaging it may be. It has already been noticed

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[1] *Philp* v. *Morton*, 1816, Hume 865.

[2] *Harpers, Ltd.* v. *Greenwood & Batley*, 1896, 4 S.L.T. 116.

[3] *M'Lean* v. *Adam*, 1888, 16 R. 175; *Bruce* v. *J. M. Smith, Ltd.*, 1898, 1 F. 327, per Lord Kincairney at p. 330.

[4] *Bruce* v. *J. M. Smith, Ltd., supra.*

[5] *Ratcliffe* v. *Evans*, [1892] 2 Q.B. 524.

[6] *Shepherd* v. *Wakeman*, 1661, 1 Siderfin, 79; 82 E.R. 982.

[7] *White* v. *Mellin*, [1895] A.C. 154; *Empire Typesetting Machine Co. of New York* v. *Linotype Co.*, 1898, 79 L.T. 8; affd. 1899, 81 L.T. 331 (H.L., E.); *Young* v. *Macrae*, 1862, 32 L.J. Q.B. 6.

[8] See para. 1118, *infra.*

[9] *Sheriff* v. *Wilson*, 1855, 17 D. 528; *MacLaren* v. *Ritchie*, 1856, reported in Clegg on Reparation, 2nd ed., p. 611; *Paterson* v. *Welch*, 1893, 20 R. 744; *Andrew* v. *Macara*, 1917 S.C. 247.

[10] See para. 1128, *infra.*

[11] *Paterson* v. *Welch*, 1893, 20 R. 744; *Andrew* v. *Macara*, 1917 S.C. 247.

[12] *Gray* v. *Society for Prevention of Cruelty to Animals*, 1890, 17 R. 1185.

[13] *Milne* v. *Walker*, 1893, 21 R. 155.

that a mere contradiction of a particular assertion, or characterisation of a particular course of conduct, even when couched in such strong expressions as "liar" or "fraud," is not actionable; nor are mere expressions of opinion as to a state of facts truly set forth, even when the opinion, if confined to these facts, is couched in vituperative or contumelious language;[1] nor legitimate criticisms of exhibitions of skill offered to the public.[2] But, quite apart from such considerations, fair comment on the conduct of people in public affairs is not actionable; and full latitude is allowed both in making such comments and in replying to them, even if the person who is criticised is held up to public hatred, ridicule, or contempt,[3] so long as private character is not attacked or suggestions made of base or corrupt motives.[4] Similarly, fair comments on proceedings in a public Court of justice are not actionable.[5] A newspaper has the same right to make such comments as a private person.[6] But even in such matters of public interest a statement may become actionable if it injuriously ascribes to the person referred to a specific act which has no foundation in fact.[7]

Section 9.—Fair Report.

1119. A fair report of proceedings in open Court, or an accurate excerpt from the public records of a Court, is not actionable, since the proceedings and records are themselves absolutely privileged, and any person might have heard or seen them for himself.[8] And for similar reasons a fair report of a meeting between an insolvent debtor and his creditors has been held not to be actionable.[9] But such a report will be actionable if, through being incomplete[10] or inaccurate,[11] it conveys a defamatory implication; and the rule would probably not protect the publication of the contents of any written pleadings, or even of a Closed Record, which had not actually been discussed in open Court.[12]

Section 10.—Innuendo.

Subsection (1).—*When required.*

1120. The statement which is complained of may not bear clearly on the face of it a defamatory meaning; and in that case, in order to be actionable, the statement must be "innuendoed," or shown to have in

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[1] See para. 1110, *supra*.
[2] See para. 1113, *supra*.
[3] *M'Laughlan* v. *Orr, Pollock & Co.*, 1894, 22 R. 38.
[4] *Hamilton* v. *Stevenson*, 1822, 3 Murray 81; *Aiton* v. *M'Culloch*, 1823, 3 Murray 291; *Hunter* v. *Ferguson & Co.*, 1906, 8 F. 574.
[5] *Longworth* v. *Hope & Cooke*, 1865, 1 S.L.R. 53.
[6] *Langlands* v. *John Leng & Co.*, 1916 S.C. (H.L.) 102.
[7] *Paterson* v. *Welch*, 1893, 20 R. 744.
[8] *Richardson* v. *Wilson*, 1879, 7 R. 237; *M'Lintock* v. *Stubbs, Ltd.*, 1902, 5 F. 1.
[9] *Fulton* v. *Stubbs, Ltd.*, 1903, 5 F. 814.
[10] *Wright & Greig* v. *Outram & Co.*, 1890, 17 R. 596.
[11] *Mazure* v. *Stubbs, Ltd.*, 1919 S.C. (H.L.) 112.
[12] *Macleod* v. *Justices of Peace of Lewis*, 1892, 20 R. 218.

fact borne a defamatory meaning. If the statement complained of, however, is a mere unambiguous statement of alleged facts it is not defamatory simply because one out of various possible inferences from these facts may be injurious, while others are harmless. In order to make the statement actionable it must be shown by extrinsic facts that the facts alleged in the statement did in fact in the circumstances bear the injurious inference.[1] In such a case the injurious inference from the facts alleged in the statement complained of in combination with the extrinsic facts averred by the injured party may be so unambiguous that it is unnecessary to give point to it by setting it out in the form of an "innuendo" either in the pleadings or in the issue submitted to the jury.[2] Sometimes the statement complained of is ambiguous in itself, containing both an innocent and a defamatory meaning; or, though apparently unambiguously innocent in its natural and obvious meaning, it may have been used in some non-natural and defamatory meaning. In such cases the statement is not actionable unless, owing to the circumstances in which it was uttered or otherwise, it did in fact convey the defamatory meaning; [3] but the person who made the statement will not escape liability by showing that he did not intend to defame if in fact he did so.[4]

SUBSECTION (2).—*Relevancy.*

1121. When an innuendo is required, the pursuer must set forth in his pleadings the precise innuendo or defamatory meaning which he undertakes to prove that the statement complained of actually bore, and the extrinsic facts, if any are required, which he undertakes to prove in order to substantiate that innuendo.[5] The Court will not assist him to discover a defamatory meaning, or allow him to put one to a jury in an issue, which he has not himself relevantly averred on record.[6] The innuendo proposed must be "a reasonable, natural, or necessary inference from the words used, regard being had to the occasion and the circumstances of their publication," [7] and whether it answers this test is a matter of law for the Court to decide and not a matter of fact for a jury. Accordingly, the case will not be allowed to go to trial if the Court consider, on consideration of the pursuer's own averments, that the statement will not reasonably bear the actual innuendo put upon it by him.[8] The same statement, however, may be capable of

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[1] *Capital and Counties Bank* v. *Henty*, 1882, 7 App. Cas. 741; *Wood* v. *Edinburgh Evening News, Ltd.*, 1910 S.C. 895; *Russell* v. *Stubbs, Ltd.*, 1913 S.C. (H.L.) 14; *Mazure* v. *Stubbs, Ltd.*, 1919 S.C. (H.L.) 112.

[2] *Morrison* v. *Ritchie & Co.*, 1902, 4 F. 645.

[3] *Hunter* v. *Ferguson & Co.*, 1906, 8 F. 574; *Smith* v. *Walker*, 1912 S.C. 224; *Bernhardt* v. *Abrahams*, 1912 S.C. 748; *James* v. *Baird*, 1916 S.C. 510, and (H.L.) 158; *Langlands* v. *John Leng & Co.*, 1916 S.C. (H.L.) 102.

[4] *E. Hulton & Co.* v. *Jones*, [1910] A.C. 20.

[5] *Sexton* v. *Ritchie & Co.*, 1890, 17 R. 680; *Smith* v. *Walker*, 1912 S.C. 224; *James* v. *Baird*, 1915 S.C. 23; 1916 S.C. 510; and 1916 S.C. (H.L.) 158.

[6] *James* v. *Baird*, 1916 S.C. (H.L.) 158.

[7] Per Lord Shaw in *Russell* v. *Stubbs, Ltd.*, 1913 S.C. (H.L.) 14, at p. 24.

[8] *Langlands* v. *John Leng & Co.*, *supra.*

bearing one particular innuendo although it will not bear another which has a wider or more injurious import.[1] Newspaper articles are not to be subjected to a critical examination of their words, but the question is "what the words would convey to an ordinary reader, reading the articles as articles in newspapers are usually read." [2]

1122. Sometimes an innuendo is also used, both in the pleadings and in the issue submitted to a jury, merely for the purpose of focussing or crystallising the defamatory meaning of a diffuse passage which is clearly defamatory and does not need construction.[3]

Subsection (3).—*Proof.*

1123. If the innuendo proposed answers the test of relevancy, it is a matter of fact to be determined by the jury whether the statement did in fact convey, or tend to convey, the injurious implication set forth in the innuendo; [4] but if the slander has been communicated privately to only a very few persons, it is essential that it should be proved that some at least of these persons did in fact take the slanderous innuendo to be the meaning of it.[5]

Section 11.—Malice.

Subsection (1).—*Definition.*

1124. The right to damages for defamation being a branch of the law of reparation, it is of the essence of the right that the statement or act complained of should have been made or done with the intention of injuring, or with a reckless or negligent disregard of the injury which it ought reasonably to have been anticipated might result from it.[6] This is what, in connection with defamation, has come to be, technically, if rather misleadingly, termed "malice"; and it may be attributed to a company or a private partnership no less than to an individual.[7]

Subsection (2).—*Inference of Malice* ipso facto *from uttering the Slander.*

1125. Where the imputations implied by the statement complained of are clearly defamatory of character or conduct, or are what is commonly called "slanderous," or where the meaning conveyed by the statement clearly tends to be injurious otherwise, the law infers "malice"

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[1] *Mazure* v. *Stubbs, Ltd.*, 1919 S.C. (H.L.) 112.
[2] *Hunter* v. *Ferguson & Co.*, 1906, 8 F. 574.
[3] See, *e.g.*, *Lever Bros., Ltd.* v. *The Daily Record, Glasgow, Ltd.*, 1909 S.C. 1004.
[4] *Russell* v. *Stubbs, Ltd.*, 1913 S.C. (H.L.) 14.
[5] *Bernhardt* v. *Abrahams*, 1912 S.C. 748.
[6] *Urquhart* v. *Dick*, 1865, 3 M. 932, per Lord Kinloch; and cases cited in paras. 1125 and 1126, *infra*.
[7] *Gordon* v. *British and Foreign Metaline Co.*, 1886, 14 R. 75; *Finburgh* v. *Moss Empires*, 1908 S.C. 928.

from the mere fact of making or repeating it; and no proof of "malice" is required,[1] nor does the absence of any intention to injure,[2] or the fact that the statement was in the form of a mere quotation of a statement made or communicated by another person,[3] or was made in answer to a question,[4] or through mere inadvertence,[5] avail to elide responsibility for the injurious consequences. But a person who innocently disseminates a slander by handling or distributing or selling a publication, the contents of which he neither knew nor ought to have known, would probably, following the analogy of English decisions, be held not to be liable in damages.[6]

Subsection (3).—*Cases where Malice is not inferred from the Slander alone.*

1126. In cases where the injurious tendencies of the meaning which was conveyed by the statement are not self-evident it may be necessary to aver and prove specific facts from which "malice" may be inferred. Thus, where damages are sought for injury in being exposed to public ridicule or hatred and contempt by imputations which are not in themselves slanderous, it would appear that it is necessary to aver and prove that the statements complained of were made with the intention of so injuring.[7] And it is doubtful whether, without averments and proof of negligence, an action will lie against a newspaper for the publication of an advertisement, *prima facie* innocent and non-injurious, where there are no circumstances to create a suspicion in the minds of the managers that some imputation is intended against some particular person.[8] It has been held in England that an action will not lie for defamatory statements about a rival's wares without proof of an intention to injure or of knowledge that the statements were untrue.[9] And malice is not inferred *per se* from a slander implied by a wrong medical diagnosis. The injured party must prove that the professed diagnosis was made without due examination and inquiry.[10]

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[1] *Outram* v. *Reid*, 1852, 14 D. 577.
[2] *Morrison* v. *Ritchie & Co.*, 1902, 4 F. 645; *E. Hulton & Co.* v. *Jones*, [1910] A.C. 20.
[3] *Marshall* v. *Renwick*, 1835, 13 S. 1127.
[4] *Harkness* v. *The Daily Record, Ltd.*, 1924, S.L.T. 759.
[5] *Fletcher* v. *Wilsons*, 1885, 12 R. 683; *Gordon* v. *Stubbs, Ltd.*, 1895, 3 S.L.T. 10 (O.H.).
[6] *Morrison* v. *Ritchie & Co.*, *supra*.
[7] *Sheriff* v. *Wilson*, 1855, 17 D. 528; *Paterson* v. *Welch*, 1893, 20 R. 744; *Andrew* v. *Macara*, 1917 S.C. 247.
[8] *Morrison* v. *Ritchie & Co.*, *supra*; *Wood* v. *Edinburgh Evening News, Ltd.*, 1910 S.C. 895.
[9] *White* v. *Mellin*, [1895] A.C. 154; *Empire Typesetting Machine Co. of New York* v. *Linotype Co.*, 1898, 79 L.T. 8; affd. 1899, 81 L.T. 331 (H.L., E.); *Young* v. *Macrae*, 1862, 32 L.J. Q.B. 6.
[10] *Strang* v. *Strang*, 1849, 11 D. 378; *Mackintosh* v. *Fraser*, 1859, 21 D. 783; 1860, 22 D. 421.

Subsection (4).—*Presumption of Malice displaced by Privilege.*

1127. In every kind of defamation the presumption of "malice" will be displaced if the party making the statement had a right or a duty to make it. In such cases the statement is said to be "privileged," and, if an action will lie at all, "malice" must be proved. The effect of privilege is discussed later.[1]

Section 12.—Veritas.

1128. The making of a statement or of an imputation about anyone which is true is not an actionable wrong, since it injures no part of the character or reputation to which he is entitled. Consequently, in order to obtain reparation on the ground of defamation, it is essential to shew that the meaning conveyed by the statements sued on is untrue. This gives rise to the defence of *veritas*, which consists in saying that the statements, or the imputations or meaning conveyed by the statements complained of, or any separable part of them, were true. This is always a good defence,[2] except, perhaps, in those very exceptional cases of holding up to public ridicule, hatred, or contempt where no specific imputation or allegation of fact is implied by the statements or publications complained of.[3] A defender is not barred from pleading *veritas* on account of having previously given an apology and retractation for the same slander, if the action is founded, not on the contract in the apology to refrain from repeating the slander, but on the new wrong done by the slander itself when subsequently repeated.[4] There is, however, a presumption, analogous to the presumption of innocence in criminal law, that imputations which are properly defamatory are untrue; and therefore their falsehood does not need to be established to enable a pursuer to succeed. The onus is laid upon the defender, if he uttered them, to prove that they are true.[5] This presumption does not arise, however, in cases where an action will lie although the meaning implied by the injurious allegations complained of is not properly defamatory. In these cases the falsehood of the allegations must be established by the pursuer in the appropriate way.[6] And in an action founded on an expression of skilled medical opinion in the form of a diagnosis or of a certificate of insanity, the onus of proof would probably be on the pursuer to shew that the diagnosis was in fact wrong.[7]

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[1] Para 1137 *et seq.*

[2] *Mackellar* v. *Duke of Sutherland*, 1859, 21 D. 222; *Brownlie* v. *Thomson*, 1859, 21 D. 480; *Buchan* v. *North British Rly. Co.*, 1894, 21 R. 379.

[3] See *Sheriff* v. *Wilson*, 1855, 17 D. 528; *M'Laren* v. *Ritchie*, 1856, reported in Glegg on Reparation, 2nd ed., p. 611.

[4] *R.* v. *S.*, 1914 S.C. 193.

[5] *Mackellar* v. *Duke of Sutherland*, *supra*.

[6] *Paterson* v. *Welch*, 1893, 20 R. 744; *Andrew* v. *Macara*, 1917 S.C. 247; see also *Bruce* v. *J. M. Smith, Ltd.*, 1898, 1 F. 327.

[7] *Mackintosh* v. *Fraser*, 1859, 21 D. 783; 1860, 22 D. 421, per Lord Deas at p. 430; 1863, 1 M. (H.L.) 37; *Mackintosh* v. *Weir*, 1875, 2 R. 877.

1129. When the defender desires to plead *veritas* he must aver on record the facts which he proposes to prove in support of his plea. If the statements sued on are specific in their character, the defender's averments will be substantially a repetition of the slander; but to substantiate the truth of a slander expressed in general terms he must make specific averments to justify it.[1] The facts averred and proved must truly justify the statement complained of and must substantiate the whole meaning of it, or of the separable part to which the plea of *veritas* applies, including any innuendo which the pursuer alleges it to have borne,[2] and must also fairly meet it in point of time.[3]

Section 13.—Rixa.

1130. Words which might otherwise have a defamatory implication have often been held not to be actionable when they were spoken *in rixa*, that is, in heated retort. The mere fact that the words were spoken in the heat of an altercation does not in itself deprive them of their actionable nature;[4] it is merely an element tending to show that words which did not in themselves amount to a definite and specific defamatory allegation, bore in the circumstances no defamatory innuendo, but were mere expressions of abuse obviously not intended to convey, and which would in consequence not convey, a serious meaning.[5]

Section 14.—Damage.

Subsection (1).—*General Rules.*

1131. It is essential to a claim for reparation for defamation, as in a claim for reparation for any other wrong, that actual injury has been caused by the statement complained of; and damages will be awarded for any loss actually caused by it. The wrong in the case of imputations which are truly "slanderous," or defamatory of character or reputation, may, however, consist solely in the injury to the feelings and self-esteem of the person about whom they are made, or to the esteem in which he is held by others. Consequently, in such cases the law infers injury to feelings from the mere fact that the defamatory imputation was conveyed to the injured party himself, and *a fortiori* if it has been conveyed to others.[6] Similarly, damage may be inferred, without any proof of special damage, from statements which are of an injurious nature to a person's credit or his professional reputation when they are made to others.[7]

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[1] *Hunter* v. *MacNaughton*, 1894, 21 R. 850; *Goodall* v. *Forbes*, 1909 S.C. 1300.

[2] *Fletcher* v. *Wilsons*, 1885, 12 R. 683; *Bertram* v. *Pace*, 1885, 12 R. 798; *British Workman's and General Assurance Co.* v. *Stewart*, 1897, 24 R. 624.

[3] *Brownlie* v. *Thomson*, 1859, 21 D. 480; *M'Donald* v. *Begg*, 1862, 24 D. 685.

[4] *Mackay* v. *Grant*, 1903, 41 S.L.R. 18; 11 S.L.T. 380.

[5] *Watson* v. *Duncan*, 1890, 17 R. 404; *Christie* v. *Robertson*, 1899, 1 F. 1155.

[6] *Outram* v. *Reid*, 1852, 14 D. 577; *Kennedy* v. *Baillie*, 1855, 18 D. 138; *Mackay* v. *M'Cankie*, 1883, 10 R. 537.

[7] *Cassidy* v. *Connachie*, 1907 S.C. 1112; *Fletcher* v. *Wilsons*, *supra*.

SUBSECTION (2).—*Special Damage.*

1132. When, however, the meaning of the statement complained of is not properly defamatory, it may be necessary to aver and prove "special damage" in the sense of injury apart from the mere loss of the esteem of others. This necessity may arise, for instance, in a case of holding up to public ridicule, hatred, and contempt, where the statements complained of are not in themselves of a slanderous nature.[1] Special damage may have to be proved in cases of "slander of title";[2] and special damage has been held in England to be essential in cases of defamation of wares by a trade rival.[3] But it is not necessary to prove special damage in suing in a Scottish Court for a slander uttered in a foreign country, though special damage may be essential to a remedy in that country, if it is a slander for which, if it had been uttered in Scotland, reparation would be given by Scots law without proving special damage.[4]

SUBSECTION (3).—*No Damage.*

1133. The defence of "no damage" is always competent; and any facts relevant to minimise the damage occasioned by the statement complained of may be averred and proved. Thus, in defence to an action based on a slander, it is competent to aver and prove that the pursuer has the reputation of being a person of the character which the slander infers; but it is not competent to aver or prove specific acts, and such averments may be ordered to be deleted from the record, as the defence in reduction of damages is the reputation, and not the fact, of being of the character imputed by the slander.[5]

SUBSECTION (4).—*Mitigation.*

1134. As damages for defamation are of a penal nature, any facts tending to mitigate the wrongfulness of the defender's motives in uttering it may be pleaded in mitigation or extinction of the damages; such as provocation;[6] or that the statement was repeated or disseminated in *bona fide* ignorance of its slanderous implication,[7] or in the *bona fide* belief that the occasion was privileged;[8] or that it was made in answer to a question,[9] or through mere inadvertence;[10] or that it was merely a repetition of what was said by another, or of a

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[1] *Paterson* v. *Welch*, 1893, 20 R. 744.

[2] *Harpers, Ltd.* v. *Greenwood & Batley* (O.H.), 1896, 4 S.L.T. 114.

[3] *White* v. *Mellin*, [1895] A.C. 154; *Empire Typesetting Machine Co. of New York* v. *Linotype Co.*, 1898, 79 L.T. 8; affd. 1899, 81 L.T. (H.L.) 331; *Young* v. *Macrae*, 1862, 32 L.J. Q.B. 6.

[4] *M'Larty* v. *Steele*, 1881, 8 R. 435.

[5] *C.* v. *M.*, 1923 S.C. 1.

[6] *Watson* v. *Duncan*, 1890, 17 R. 404.

[7] *Morrison* v. *Ritchie & Co.*, 1902, 4 F. 645.

[8] See "Privilege," para 1136 *et seq.*, *infra*; *James* v. *Baird*, 1916 S.C. 510, per Lord Pres. Strathclyde at p. 517.

[9] *Harkness* v. *Daily Record, Ltd.*, 1924 S.L.T. 759.

[10] *Fletcher* v. *Wilsons*, 1885, 12 R. 683; *Gordon* v. *Stubbs, Ltd.* (O.H.), 1895, 3 S.L.T. 10.

current report;[1] or that the defender had been led to believe in the truth of the slander by the pursuer himself.[2] But if the person who repeats the slander refuses to disclose its author, he cannot plead in mitigation of damages any of the circumstances under which its author uttered it.[3] If a plea not merely of provocation or of *rixa* but of *compensatio injuriarum* is put forward, on the ground that the pursuer also slandered the defender, this issue cannot competently be tried as a defence but must be raised in a separate action.[4]

Subsection (5).—*Aggravation.*

1135. Similarly, the pursuer is entitled to lead evidence as to the circumstances in which the slander was uttered by the defender, as these may competently be considered in aggravation of damages.[5]

Section 15.—Privilege.

Subsection (1).—*Definition.*

1136. There are cases in which it may be pleaded in defence to an action of damages for slander that the statements complained of were made on an occasion or in circumstances which entitled the defender to express himself with freedom. This defence is known as privilege.[6] The defence may also be pleaded by the agent or by the employee of the person to whom the privilege properly belongs, if he was acting within the scope of his employment or on instructions in uttering the slander, but not otherwise.[7]

Subsection (2).—*Absolute Privilege.*

1137. In a few cases the law, for reasons of public policy, affords a complete immunity. These are called cases of absolute privilege. No action whatever will be allowed for defamation against parties protected by absolute privilege. This complete immunity attaches to Members of Parliament for words used in Parliament,[8] to reports of speeches in Parliament provided the defender prove their accuracy,[9] and to petitions to Parliament.[10] Judges, whether in the superior or inferior Courts, are absolutely privileged in saying whatever they please

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[1] *Scott* v. *M'Gavin*, 1821, 2 Murray 486; *Kingan* v. *Watson*, 1828, 4 Murray 489; *Marshall* v. *Renwick*, 1835, 13 S. 1127; *M'Culloch* v. *Litt*, 1851, 13 D. 960.

[2] *C.* v. *M.*, 1923 S.C. 1.

[3] *Browne* v. *Macfarlane*, 1889, 16 R. 368.

[4] *Tullis* v. *Christie*, 1850, 12 D. 867.

[5] *Cunningham* v. *Duncan & Jamieson*, 1889, 16 R. 383.

[6] See criticisms of the term by Lord Young in *Shaw* v. *Morgan*, 1888, 15 R. 865, at pp. 869, 870, and in *Nelson* v. *Irving*, 1897, 24 R. 1054 at p. 1058.

[7] *Goodall* v. *Forbes*, 1909 S.C. 1300; *Suzor* v. *Buckingham*, 1914 S.C. 299.

[8] *Dillon* v. *Balfour*, 1887, 20 L.R. Ir. 600; see Bill of Rights, 1 Wm. & M. Sess. 2, c. 2, s. 2.

[9] *Rex* v. *Creevey*, 1813, 1 M. & S. 273; *Wason* v. *Walter*, 1868, L.R. 4 Q.B. 73.

[10] *Kane* v. *Mulvany*, 1866, Ir. Rep. 2 C.L. 402.

which has the remotest bearing on any matter before them.[1] Counsel or other pleaders in any Court (including a Licensing Court [2] and a Statutory Arbitration [3]), when speaking in the exercise of their functions as such, and that whether in written pleadings [4] or oral; [2] witnesses, not only in evidence but also in precognition,[5] and probably jurymen [6] have a similar privilege. The litigants themselves have only a qualified privilege,[7] even when the slander founded on consists in the whole subject-matter of the original litigation,[8] but if one party is adduced as a witness by the other party he then enjoys the absolute privilege of an ordinary witness.[9] When a person, by joining the membership of an association, such as a church, submits himself by the constitution of that association to the jurisdiction of a Court established by its constitution, the members of that Court are absolutely privileged in respect of a competent judgment of the Court upon him in a matter within its jurisdiction,[10] but not in respect of statements made by them as informers or accusers to the Court.[11]

1138. There is an absolute privilege attaching to published reports printed by order of Parliament; [12] and also to the publication of a fair and accurate report of proceedings in Courts of law, provided the proceedings reported are such as a reader might have heard for himself if he had been present in Court.[13] In England a Minister of State has been held to have absolute privilege for communications to a colleague on affairs of State,[14] and a military officer for his reports on subordinates,[15] and similarly the Lord Advocate has probably an absolute privilege in anything he may say or do in the prosecution of the duties of his office.[16]

Subsection (3).—*Qualified Privilege.*

(i) *In General.*

1139. As stated above,[17] the law infers from the mere making of a defamatory statement that it was made in "malice," in the technical

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[1] *Haggart's Trs.* v. *Lord Pres. Hope*, 1824, 2 Shaw, App. 125; *Harvey* v. *Dyce*, 1876, 4 R. 265; *Primrose* v. *Waterston*, 1902, 4 F. 783.

[2] *Williamson* v. *Umphray and Robertson*, 1890, 17 R. 905.

[3] *Slack* v. *Barr*, 1918 (O.H.), 1 S.L.T. 133.

[4] *Rome* v. *Watson*, 1898, 25 R. 733.

[5] *Watson* v. *M'Ewan*, 1905, 7 F. (H.L.) 109; *Slack* v. *Barr*, *supra*.

[6] *Royal Aquarium, etc. Society* v. *Parkinson*, [1892] 1 Q.B. 431.

[7] See paras. 1139, 1149, *infra*.

[8] *Gordon* v. *British and Foreign Metaline Co.*, 1886, 14 R. 75.

[9] *Mackintosh* v. *Weir*, 1875, 2 R. 877.

[10] *Dunbar* v. *Skinner*, 1851, 13 D. 1217; *Sturrock* v. *Greig*, 1849, 11 D. 1220.

[11] *M'Dougal* v. *Campbell*, 1828, 6 S. 742; *Murray* v. *Wyllie*, 1916 S.C. 356.

[12] Parliamentary Paper Act, 1840, 3 & 4 Vict. c. 9, s. 1.

[13] *Richardson* v. *Wilson*, 1879, 7 R. 237; *Macleod* v. *Justices of Peace of Lewis*, 1892, 20 R. 218; *Pope* v. *Outram & Co., Ltd.*, 1909 S.C. 230.

[14] *Chatterton* v. *Secretary of State for India*, [1895] 2 Q.B. 189.

[15] *Dawkins* v. *Lord Paulet*, 1869, L.R. 5 Q.B. 94.

[16] *Henderson* v. *Robertson*, 1853, 15 D. 292, per Lord Justice-Clerk Hope at p. 295; *M'Murchie* v. *Campbell*, 1887, 14 R. 725, per Lord Young at p. 728.

[17] Para. 1125, *supra*.

sense,[1] that is, with the intention of injuring or with a reckless indifference as to whether or not injury may result. This inference is displaced, and the onus is put on the injured party to shew that the statement was in fact actuated by "malice," whenever there are circumstances which would justify the making of the statement, notwithstanding its injurious tendency, whether it should be true or not. The communication then enjoys a "qualified privilege." [2] "The duty of deciding whether the occasion is privileged is cast upon the judge alone, and the jury has no hand in it. The criterion as to whether the occasion is privileged or not is most tersely stated in the well-known passages of Parke B.'s judgment in *Toogood* v. *Spyring*,[3] '. . . . fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned,' and again, 'If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.'" [4] "The circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact. New arrangements of business, even new habits of life, may create unexpected combinations of circumstances which, though they differ from well-known instances of privileged occasion, may none the less fall well within the plain yet flexible language of the definition" by Parke B. quoted above.[5]

1140. The tendency has been to extend the scope of cases to which a qualified privilege attaches "upon the principle that it is to the general interest of society that correct information should be obtained as to the character of the persons in whom others have an interest," [6] although there can be no privilege unless the person making the communication has himself some such definite right or duty or interest in the matter as is referred to above.[7] But the existence of circumstances which the law regards as creating a privilege is a matter of fact, and not of intention or belief: so that where the facts which would constitute a privileged occasion do not actually exist, the belief, however *bona fide*, of the person making a defamatory statement that they do exist does not create any privilege, to the effect of throwing the onus on to the injured party to prove "malice," whatever effect such a belief might have in mitigation of damages.[8]

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[1] See para. 1124, *supra*.
[2] *Cochrane* v. *Young*, 1922 S.C. 696.
[3] 1834, 1 C.M. & R. 181, at p. 193.
[4] Per Lord Dunedin in *Adam* v. *Ward*, [1917] A.C. 309, at p. 328.
[5] Per Buckmaster L.C. in *London Association for Protection of Trade* v. *Greenlands, Ltd.*, [1916] 2 A.C. 15, at p. 22.
[6] Per Erle C.J. in *Whiteley* v. *Adams*, 1863, 15 C.B. (N.S.) 392, at p. 418.
[7] *Cochrane* v. *Young, supra; Hayford* v. *Forrester Paton*, 1927 S.C. 740.
[8] *Henderson* v. *Henderson*, 1855, 17 D. 348; *James* v. *Baird*, 1916 S.C. 510; 1916 S.C. (H.L.) 158.

(ii) *Public Duties and Interests.*

1141. The qualified privilege sometimes arises from a public duty inherent in the position occupied by the person who makes the statement complained of. Public officials making statements in the performance of their duties have a specially high privilege. This is dealt with later in treating of Probable Cause.[1] And probably anyone making defamatory imputations in the performance of a statutory duty will be held to be privileged.[2] The mere fact, however, that action is taken in conformity with statutory procedure, or with a view to it, does not confer any privilege in the absence of a duty to take the action. Thus the mere fact that a diagnosis of insanity is contained in a certificate on which a person is incarcerated under the Lunacy Acts does not *per se* confer any privilege on the diagnosis.[3] A privilege also attaches to one holding office, for instance, a town councillor,[4] or a member of a public board,[5] when publicly making a statement in the council or board which is not impertinent to its functions;[6] or the headmaster of a school.[7]

1142. Sometimes the privilege arises from the conjunction of a public duty inherent in the person or body informed with a public duty inherent in the person who gives the information, as in the case of a person giving information to the criminal authorities in regard to a crime. This also is dealt with in connection with Probable Cause.[1] The protection of privilege is also applied to complaints laid by persons having a public duty to do so, before other authorities properly constituted to deal with them. Thus, the referee in a football match has been held to be privileged in reporting on the conduct of a player to the committee of the association under whose auspices the match is played.[8] A minister has also been held to be privileged in laying before his kirk-session charges against the suitability of a candidate for the office of elder, and in informing the candidate of the charges,[9] and members of the congregation would probably also be privileged in making such charges to the kirk-session, though not to other members in canvassing for their opposition to the candidate's appointment,[10] nor in making statements to an elder in presence of a third party.[11] It is doubtful how far a letter by one member of a congregation to the minister in regard to another member may be privileged,[11] but a parish minister has been held to be privileged in making complaints to the

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[1] Para. 1153 *et seq., infra.*
[2] *Finburgh* v. *Moss Empires, Ltd.*, 1908 S.C. 928.
[3] *Strang* v. *Strang*, 1849, 11 D. 378; *Mackintosh* v. *Fraser*, 1859, 21 D. 783.
[4] *Shaw* v. *Morgan*, 1888, 15 R. 865; *Neilson* v. *Johnston*, 1890, 17 R. 442.
[5] *M'Lean* v. *Adam*, 1888, 16 R. 175.
[6] *Rae* v. *M'Lay*, 1852, 14 D. 988.
[7] *Milne* v. *Bauchope*, 1867, 5 M. 1114.
[8] *Murdison* v. *Scottish Football Union*, 1896, 23 R. 449.
[9] *Murray* v. *Wyllie*, 1916 S.C. 356.
[10] *Jack* v. *Fleming*, 1891, 19 R. 1; see also *Croucher* v. *Inglis*, 1889, 16 R. 774; *Murray* v. *Wyllie, supra.*
[11] *Rankine* v. *Roberts*, 1873, 1 R. 225.

proper authorities in regard to the suitability of a person in his own parish to have the charge of pauper children boarded with him,[1] and in making charges in presbytery against another minister in the same presbytery,[2] though not in making defamatory statements from the pulpit, in the absence of any duty imposed on him to do so.[3]

1143. Sometimes the privilege arises from the legitimate public interest of the person making the statement, in combination with a public duty or interest in regard to the matter on the part of the person or body to whom it is made, as in the case of a ratepayer making complaints to a county council, and to the Local Government Board, in regard to the management of a public hospital under their control,[4] or the president of a nursing association making complaints to a parish council in regard to the failure of their medical officer to utilise the services of the association's nurse for the treatment of poor persons whom the parish council have a duty to assist.[5] A person who is invited to subscribe in aid of any undertaking, whether by a public or a private appeal, is privileged in communicating to the members and secretary of a committee under whose auspices the appeal is made, a report in regard to the administration of the undertaking.[6] Privilege will also cover criticism, by persons with a legitimate interest in the matter, of candidates for public posts and local elected bodies;[7] but the criticisms will lose this privilege if they are widely disseminated beyond the locality interested in the affairs, or are uttered by persons having no local connection,[8] or if they are published by a newspaper, not as an editorial article, but as an anonymous letter the author of which the newspaper does not disclose.[9]

(iii) *Private Duties and Interests.*

1144. Where the privilege claimed arises from a private right or duty the cases are of endless variety and difficult to classify. Probably the act of informing a person that a wrong has been done to him will be privileged, whoever the informer may be;[10] and perhaps the converse case of a slander implied in demanding reparation for a wrong done is also privileged,[11] but a person would appear to have no privilege in merely *de plano* charging another with doing, or attempting to do, him a wrong, unless the charge is made incidentally to the taking of some legitimate steps for the detection or prevention of the wrong.[12]

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[1] *Croucher* v. *Inglis*, 1889, 16 R. 774.
[2] *A.* v. *B.*, 1895, 22 R. 984.
[3] *Adam* v. *Allan*, 1841, 3 D. 1058; *Dunbar* v. *Skinner*, 1851, 13 D. 1217.
[4] *Couper* v. *Lord Balfour of Burleigh*, 1914 S.C. 139.
[5] *James* v. *Baird*, 1916 S.C. (H.L.) 158.
[6] *Hayford* v. *Forrester Paton*, 1927 S.C. 740.
[7] *Bruce* v. *Leisk*, 1892, 19 R. 482.
[8] *Anderson* v. *Hunter*, 1891, 18 R. 467.
[9] *Brims* v. *Reid & Sons*, 1885, 12 R. 1016; *M'Kerchar* v. *Cameron*, 1892, 19 R. 383.
[10] *Nelson* v. *Irving*, 1897, 24 R. 1054.
[11] *M'Fadyen* v. *Spencer & Co.*, 1892, 19 R. 350.
[12] *Reid* v. *Moore*, 1893, 20 R. 712; *Cumming* v. *Great North of Scotland Rly. Co.*, 1916 (O.H.), 1 S.L.T. 181; *Jardine* v. *North British Rly. Co.*, 1923 (O.H.), S.L.T. 55.

1145. The interest of the person informed, together with certain relations subsisting between him and the informer, may give privilege.[1] Thus, a law-agent is privileged in making a defamatory statement in the course of his professional duties on the instructions of his client, and he will not lose the privilege on the death of the client if he is then acting on behalf of the client's representatives; but he may lose the privilege if he goes beyond what his instructions, or the scope of his professional duties, warrant,[2] or if he adopts his client's slander by adding his own personal statement to it.[3] Any agent may be privileged in making a statement to his principal in the performance of a duty which is implied in the agency. Thus, a trade protection association has been held to be privileged in making reports to its members on the credit of people with whom they might do business,[4] or on the character of persons who might be employed by them.[5] And a subcautioner has been held to be privileged in intimating to a principal cautioner the reasons for the withdrawal of his guarantee.[6]

1146. An employer has been held to be privileged in giving reasons for an employee's dismissal to the employee, and to the parents,[7] and fellow-servants [8] of the employee; in giving a "character" to a subsequent or prospective employer,[9] or to the employment agency through which the servant was obtained, even though the "character" was not asked for by the agency,[10] but not in making such statements publicly;[11] and also in making complaints about a servant to a party who has guaranteed the servant's fidelity.[12] A member of a committee has been held to be privileged in communicating a complaint about the conduct of a servant of the committee to other members of the committee and to other persons with a legitimate interest in the matter.[13] But one is not privileged in making accusations against the servant of another, either to the servant,[14] or to the servant's employer ;[15] and a mistress is not *prima facie* privileged in expressing her views to her domestic servants about the men with whom they keep company.[16]

1147. Those responsible for the management of a public place of entertainment are privileged in making statements which are necessary for maintaining the proper and orderly conduct of the place.[17] And a

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[1] *Milne* v. *Smiths*, 1892, 20 R. 95, per Lord Kinnear at pp. 100, 101 ; *Nelson* v. *Irving*, *supra*, per Lord Young at p. 1060 ; *Moffat* v. *Coats*, 1906, 14 S.L.T. 392 ; 44 S.L.R. 20.

[2] *Ramsay* v. *Nairne*, 1833, 11 S. 1033 ; *Wilson* v. *Purvis*, 1890, 18 R. 72.

[3] *Crawford* v. *Dunlop*, 1900, 2 F. 987.

[4] *Bayne & Thomson* v. *Stubbs, Ltd.*, 1901, 3 F. 408 ; *Barr* v. *Musselburgh Merchants Association*, 1912 S.C. 174.

[5] *Keith* v. *Lauder*, 1905, 8 F. 356.

[6] *Stewart* v. *Hannah*, 1905, 8 F. 107.

[7] *Watson* v. *Burnet*, 1862, 24 D. 494.

[8] *Bryant* v. *Edgar*, 1909 S.C. 1080 ; *A. B.* v. *X. Y.*, 1917 S.C. 15.

[9] *Macdonald* v. *M'Coll*, 1901, 3 F. 1082.

[10] *Farquhar* v. *Neish*, 1890, 17 R. 716.

[11] *Christian* v. *Lord Kennedy*, 1818, 1 Murray 427.

[12] *Dundas* v. *Livingstone & Co.*, 1900, 3 F. 37.

[13] *Cochrane* v. *Young*, 1922 S.C. 696.

[14] *Reid* v. *Moore*, 1893, 20 R. 712.

[15] *M'Callum* v. *M'Diarmid & Co.*, 1900, 2 F. 357.

[16] *Milne* v. *Smiths*, *supra*.

[17] *Finburgh* v. *Moss Empires, Ltd.*, 1908 S.C. 928 ; *Gorman* v. *Moss Empires, Ltd.*, 1913 S.C. 1.

member of the public has been held privileged in making to the chief constable charges of irregularities against a policeman.[1]

(iv) *Judicial Slander.*

1148. Defamatory words used by a litigant (sometimes called "judicial slander"), whether they are relevant or not, so long only as they are pertinent to his cause, and whether they are used of other parties to the litigation or of third parties, are privileged, since the litigant is *prima facie* actuated not by "malice" but by his legitimate interest to further his suit.[2] Such slanders are protected by a very high degree of privilege, but they do not enjoy an absolute privilege, even though they embrace the whole subject-matter of the original litigation;[3] and there is no privilege at all unless the words were uttered actually in the course of the judicial proceedings.[4] The privilege, however, covers communications between the parties or their agents on the matters in dispute in the course of negotiations preceding the raising of the action,[5] or discussing liability even though no action is subsequently raised,[6] and communications from the litigants to their own counsel or agents in reference to the matter.[7] Privilege of "judicial slander" covers statements made in any Court,[8] and even in bankruptcy [9] and arbitration [10] proceedings.

Section 16.—Effects of Privilege.

Subsection (1).—*Presumption of No Malice.*

(i) *General Effects.*

1149. Absolute privilege gives complete immunity.[11] Qualified privilege, which alone is dealt with in this section, does not give complete immunity. Qualified privilege merely rebuts the inference of "malice" in the technical sense,[12] and transfers to the pursuer the onus of proof that the slander was in fact prompted by "malice."[13] If the privilege appear from the pursuer's own averments, "malice" must be relevantly averred by him on record. If the defender pleads privilege, he must aver

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[1] *Cassidy* v. *Connachie*, 1907 S.C. 1112.

[2] *Mackellar* v. *Duke of Sutherland*, 1859, 21 D. 222; *Scott* v. *Turnbull*, 1884, 11 R. 1131; *Williamson* v. *Umphray and Robertson*, 1890, 17 R. 905; *Selbie* v. *Saint*, 1890, 18 R. 88; *Stevenson* v. *Wilson*, 1903, 5 F. 309.

[3] *Gordon* v. *British and Foreign Metaline Co.*, 1886, 14 R. 75.

[4] *Scott* v. *Johnstone* 1885, 12 R. 1022.

[5] *Campbell* v. *Cochrane*, 1905, 8 F. 205.

[6] *Graeme-Hunter* v. *The Glasgow Iron and Steel Co., Ltd.*, 1908 (O.H.), 16 S.L.T. 72; *M'Fadyen* v. *Spencer & Co.*, 1892, 19 R. 350.

[7] *Williamson* v. *Umphray and Robertson*, *supra*; and see also *Watson* v. *M'Ewan*, 1905, 7 F. (H.L.) 109; *Campbell* v. *Cochrane*, 1905, 8 F. 205.

[8] *Gibsons* v. *Marr*, 1823, 3 Murray 271.

[9] *M'Caig* v. *Moscrip*, 1872, 10 S.L.R. 140; *Oliver* v. *Burnet*, 1895 (O.H.), 3 S.L.T. 163.

[10] *Neill* v. *Henderson*, 1901, 3 F. 387.

[11] See paras. 1137, 1138, *supra*.

[12] See paras. 1124, 1125, *supra*.

[13] See, *e.g.*, per Lord Young in *Shaw* v. *Morgan*, 1888, 15 R. 865, at pp. 869, 870, and in *Nelson* v. *Irving*, 1897, 24 R. 1054, at p. 1058; and also *Mills* v. *Kelvin & James White, Ltd.*, 1913 S.C. 521; *Lyal* v. *Henderson*, 1916 S.C. (H.L.) 167; *A. B.* v. *X. Y.*, 1917 S.C. 15.

the facts from which it arises, and he must either admit that he used the words libelled, or set forth on record the words which he maintains he actually did use; [1] and if the pursuer is to meet a case of privilege arising at the trial, he should have averments on his record of the facts which he would prove to show malice,[2] as otherwise the defender, if he established facts which in the opinion of the presiding judge shew that the occasion was privileged, will be entitled to a verdict.

(ii) *Necessity of Averment of Facts and Circumstances inferring Malice.*

1150. In the usual case where privilege appears from the pursuer's averments, it is not sufficient that he aver malice in general terms, "for the simple reason that it does not afford to a defender adequate notice of the case which he will be called upon to meet"; [3] but in order that the case may be relevant to be sent to trial, he must aver those extrinsic facts and circumstances from which he wishes the jury to infer malice. The function of privilege in the law of defamation is to protect people from vexatious litigations which would hamper them in the fulfilment of a duty or the exercise of a right. Consequently, assuming that some element of "malice" was present in the uttering of the slander, and that there was thus a conflict between duty or right, on the one hand, and "malice" on the other hand, as the dominant or substantial actuating motive in uttering it, the degree of "malice" required to outweigh the claims of the duty or the right to consideration in determining whether the perpetrator of the slander can appropriately be held liable for its injurious consequences will vary according to the importance of the duty or the right or interest to be protected. This element of degree is reflected in the degree of specification which the law requires in the averments of malice on record. "A party may be held to more strict averments in one class of cases than in another." [4] "The degree and character of the specification which is required for the purpose of relevancy must vary with the circumstances of each case, but the standard must always be such as to make the charge of malice *prima facie* reasonable." [5] Thus, a very high degree of privilege attaches to "judicial slanders"; [6] and consequently averments of malice in uttering a "judicial slander" will be very strictly scrutinised to ascertain whether they set out a circumstantial case.[7] Similar con-

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[1] *Fraser* v. *Wilson*, 1850, 13 D. 289.

[2] *Ritchie & Son* v. *Barton*, 1883, 10 R. 813; *Ingram* v. *Russell*, 1893, 20 R. 771.

[3] Per Lord President Strathclyde in *Suzor* v. *M'Lachlan*, 1914 S.C. 306, at p. 312.

[4] *Suzor* v. *M'Lachlan*, 1914 S.C. 306.

[5] *Elder* v. *Gillespie*, 1923 (O.H.), S.L.T. 32; see also *Stevenson* v. *Wilson*, 1903, 5 F. 309, per Lord Maclaren at p. 316; *Chalmers* v. *Barclay, Perkins & Co., Ltd.*, 1912 S.C. 521; *Dunnet* v. *Nelson*, 1926 S.C. 764.

[6] See para 1148, *supra*.

[7] *M'Intosh* v. *Flowerdew*, 1851, 13 D. 726; *Scott* v. *Turnbull*, 1884, 11 R. 1131; *Gordon* v. *British and Foreign Metaline Co.*, 1886, 14 R. 75; *Beaton* v. *Ivory*, 1887, 14 R. 1057, per Lord President Inglis at p. 1062; *M.* v. *H.*, 1908 S.C. 1130; *Mitchell* v. *Smith*, 1919 S.C. 664.

siderations govern the relevancy of averments of malice in cases of slander uttered by high officials in the performance of a public duty.[1] In other cases the degree of specification required will vary with the circumstances, ranging from cases where averments of extrinsic facts and circumstances inferring malice will be required (as, for instance, in the cases of a person giving information of a crime,[2] or of a minister [3] or a football referee [4] or a person invited to subscribe to a fund,[5] making complaints to the appropriate bodies in each case) on the one hand, to cases on the other hand where the privilege is so slender that a bare averment that the statement was made maliciously will suffice.[6]

(iii) *Facts and Circumstances which infer Malice.*

1151. The kind of facts and circumstances which may be relevant to infer malice as the dominant motive in uttering a slander includes anything which reasonably displaces the presumption that the words were uttered in the performance of a duty or the exercise of a right;[7] for instance, the knowledge of the defender that the statements were untrue, provided the averments disclose circumstances from which such knowledge may be inferred;[8] failure to make reasonable inquiry as to their truth,[9] provided the circumstances called for such inquiry before making the statement;[10] needless publicity given to the slander;[11] a discrepancy between an earlier and a later "character" given to a former servant;[12] antecedent indications of ill-will;[13] or unnecessary violence, or extravagance, or persistence, or intemperance of language or accusations.[14] But language used on a privileged occasion is not to be submitted to a strict scrutiny, and will not of itself infer malice unless it is so extreme as to rebut the presumption of good faith to which privilege gives rise;[15] and the language of a third party contained in a communication quoted

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[1] *M'Murchy* v. *Campbell*, 1887, 14 R. 725; *Beaton* v. *Ivory*, 1887, 14 R. 1057; *Innes* v. *Adamson*, 1889, 17 R. 11; *Buchanan* v. *Glasgow Corporation*, 1905, 7 F. 1001; *Farrell* v. *Boyd*, 1907, 44 S.L.R. 870; 15 S.L.T. 327; *Murray* v. *Wyllie*, 1916 S.C. 356.

[2] *M'Ternan* v. *Bennett*, 1898, 1 F. 333; *Rae* v. *Scottish Society for Prevention of Cruelty to Children*, 1924 S.C. 102.

[3] *Murray* v. *Wyllie*, *supra*.

[4] *Murdison* v. *Scottish Football Union*, 1896, 23 R. 449.

[5] *Hayford* v. *Forrester Paton*, 1927 S.C. 740.

[6] *Laidlaw* v. *Gunn*, 1890, 17 R. 394; *Suzor* v. *M'Lachlan*, 1914 S.C. 306, per Lord Skerrington at pp. 313 to 319.

[7] *Macdonald* v. *M'Coll*, 1901, 3 F. 1082, per Lord Kinnear at p. 1086.

[8] *Martin and Stark* v. *Cruickshanks*, 1896, 23 R. 874; *M'Ternan* v. *Bennett*, *supra*; *Burn* v. *Fraser*, 1906, 8 F. 1000; *Webster* v. *Paterson & Sons*, 1910 S.C. 459; *Couper* v. *Lord Balfour of Burleigh*, 1914 S.C. 139; *Mitchell* v. *Smith*, 1919 S.C. 664.

[9] *Finburgh* v. *Moss Empires, Ltd.*, 1908 S.C. 928; *Dinnie* v. *Hengler*, 1910 S.C. 4.

[10] *M'Lean* v. *Adam*, 1888, 16 R. 175; *Gorman* v. *Moss Empires, Ltd.*, 1913 S.C. 1; *Murray* v. *Wyllie*, *supra*; *Hayford* v. *Forrester Paton*, *supra*.

[11] *Ingram* v. *Russell*, 1893, 20 R. 771.

[12] *Macdonald* v. *M'Coll*, 1901, 3 F. 1082.

[13] *Cassidy* v. *Connachie*, 1907 S.C. 1112; *Suzor* v. *M'Lachlan*, 1914 S.C. 306.

[14] *Gall* v. *Slessor*, 1907 S.C. 708; *Webster* v. *Paterson & Sons*, *supra*; *Riddell* v. *Glasgow Corporation*, 1910 S.C. 693 (reversed on another point, 1911 S.C. (H.L.) 35).

[15] *Lyal* v. *Henderson*, 1916 S.C. (H.L.) 167; *A. B.* v. *X. Y.*, 1917 S.C. 15.

on a privileged occasion will not infer malice on the part of a person who merely quotes it.[1] Similar considerations apply to the significance which can be attached to mere persistence in making the defamatory imputation.[2] The manner of conducting the defence by counsel, in the action of damages for the slander, will not be taken into consideration as an element in proof of malice, in the absence of special instructions to him on the matter by the defender;[3] nor will the fact that the defender puts forward a plea of *veritas*.[1]

(iv) *Malice which is not Personal to the Defender.*

1152. "Malice" may be attributed to a company or to a private partnership.[4] In an action against an employer for a slander uttered by an employee "malice" may be imputed to the employer from the acts of the employee in performing the functions of his employment,[5] but the personal and private ill-will of an employee cannot be pleaded against his employer.[6] Although the protection of a privilege which is proper to the original utterer of a slander may be open to one who communicates the slander, it cannot be pleaded by the latter if he do not disclose the identity of the person who instigated it, as the injured party would thus be deprived of the opportunity of pleading "malice" personal to the instigator as against the privilege. Thus, a newspaper which publishes an anonymous communication, as distinct from an editorial article, cannot plead a privilege, or any other plea,[7] which might have been open to the writer of it, if it do not disclose the writer's identity.[8]

Subsection (2).—*Probable Cause.*

(i) *Cases where "Want of Probable Cause" is Necessary.*

1153. In a certain limited class of cases of qualified privilege the law protects persons engaged in the performance of a high public duty, or encourages them to perform it or to assist others in performing it, by making it obligatory on any person who is injured thereby to shew, as a condition of obtaining reparation, not only that the act complained of was done maliciously but also that it was done without "probable cause."[9] This is necessary, for instance, in the case of an action of damages against a procurator-fiscal for wrongous prosecution.[10] In

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[1] *Hayford* v. *Forrester Paton*, 1927 S.C. 740.

[2] *A.* v. *B.*, 1907 S.C. 1154; *Couper* v. *Lord Balfour of Burleigh*, 1913 S.C. 492; *Mills* v. *Kelvin & James White, Ltd.*, 1913 S.C. 521.

[3] *James* v. *Baird*, 1916 S.C. 510.

[4] *Gordon* v. *British and Foreign Metaline Co.*, 1886, 14 R. 75; *Finburgh* v. *Moss Empires, Ltd.*, 1908 S.C. 928.

[5] *Finburgh* v. *Moss Empires, Ltd.*, *supra*; *Riddell* v. *Glasgow Corporation*, 1910 S.C. 693.

[6] *Aiken* v. *Caledonian Rly. Co.*, 1913 S.C. 66.

[7] *Browne* v. *Macfarlane*, 1889, 16 R. 368.

[8] *Brims* v. *Reid & Sons*, 1885, 12 R. 1016; *M'Kerchar* v. *Cameron*, 1892, 19 R. 383.

[9] See *Urquhart* v. *Dick*, 1865, 3 M. 932.

[10] *Craig* v. *Peebles*, 1876, 3 R. 441.

cases falling within this category, if the action taken in performance of the duty involves the making of a defamatory imputation, the protection of this rule covers such an imputation. In any action of damages founded on the defamation the injured party must aver and prove "want of probable cause" in addition to malice. The cases in which this rule has, so far, been enforced extend only to two classes of acts, which may be described thus: (1) Acts done by public officials in the performance of a high public duty, and (2) the giving of information to the proper persons or authorities with a view to the institution of criminal proceedings (and, possibly, other forms of executive action).[1] Thus, both malice and want of probable cause must be averred and proved in an action for defamation founded on the giving of information about a crime to the criminal authorities, including an ordinary police constable,[2] with a view to investigation or prosecution; and the rule extends to cover statements made in connection with making investigations into a crime, or informing the person accused, by one who thereafter reports the matter to the criminal authorities or institutes criminal proceedings, either as a public or as a private [3] prosecutor. The whole proceedings are then considered as one act, even though a considerable time elapse before the information is given to the criminal authorities or before the criminal proceedings are instituted.[4]

1154. This form of privilege also covers such statements as medical reports made at the request of the procurator-fiscal,[5] and reports or statements by police officials to their superior officers,[6] or to inferior police officials under their supervision.[7] It has also been held that a parish minister of the Church of Scotland,[8] in respect that he is a public official, charged with the well-being and with the care of the morals of his parishioners, enjoys the protection of the same rule in regard to letters addressed by him to an inspector of poor and to the board of supervision making complaints as to the fitness of a person having the charge of pauper children in his own parish, these being the proper authorities to deal with the matter,[9] and in regard to a letter to a candidate for the office of elder, informing him that charges had been made against him which he, the minister, would have to report to the kirk-session if he did not withdraw his candidature.[10] An ordinary member of a congregation making similar complaints to his kirk-session would

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[1] See *Croucher* v. *Inglis*, 1889, 16 R. 774; *Jack* v. *Fleming*, 1891, 19 R. 1; *A.* v. *B.*, 1895, 22 R. 984; *Murray* v. *Wyllie*, 1916 S.C. 356.

[2] *Green* v. *Chalmers*, 1878, 6 R. 318.

[3] *Bell* v. *Black and Morrison*, 1865, 3 M. 1026; *Cook* v. *Spence*, 1897 (O.H.), 4 S.L.T. 295; *Chalmers* v. *Barclay, Perkins & Co., Ltd.*, 1912 S.C. 521.

[4] *Ferguson* v. *Colquhoun*, 1862, 24 D. 1428; *Lightbody* v. *Gordon*, 1882, 9 R. 934; *Chalmers* v. *Barclay, Perkins & Co., Ltd.*, *supra*; *Rae* v. *Scottish Society for Prevention of Cruelty to Children*, 1924 S.C. 102.

[5] *Urquhart* v. *Grigor*, 1864, 3 M. 283.

[6] *M'Murchie* v. *Campbell*, 1887, 14 R. 725.

[7] *Innes* v. *Adamson*, 1889, 17 R. 11; *A.* v. *B.*, 1907 S.C. 1154, per Lord Salvesen (Ordinary) at p. 1157.

[8] See CHURCH.

[9] *Croucher* v. *Inglis*, *supra*.

[10] *Murray* v. *Wyllie*, *supra*.

probably also enjoy the same privilege; [1] and also one minister making a charge against another in presbytery.[2] The rule was also held to apply when the master of a ship, in the discharge of a statutory duty, inserted a charge in the log-book.[3]

(ii) *Cases where "Want of Probable Cause" is not required.*

1155. The rule requiring "want of probable cause" to be pleaded and established does not apply to actions founded on "judicial slanders" uttered by litigants in civil proceedings,[4] nor to defamations which are not incidental to the performance of the classes of public duty which are thus specially protected by the law, even although the circumstances should constitute a case of very high "qualified privilege"; [5] nor when the pursuer relevantly avers and proves facts which would take the acts complained of out of the category of such a duty otherwise *prima facie* appearing from the circumstances.[6] But if the proceedings out of which the slander arises are *ex facie* regular and usual, and directed towards the fulfilment of such a public duty, the mere fact that they were actuated by an oblique motive and without any intention to prosecute them to their proper conclusion does not take them out of the category in regard to which the rule applies, since such obliquity of motive merely amounts to "malice" in the performance of the duty.[7] Statements in a petition by a procurator-fiscal on which a competent warrant could follow do not lose the protection of this rule because an irregular warrant has been granted on it and then withdrawn,[8] but proceedings under the irregular warrant itself have no privilege whatever.[9] In cases of reporting a crime or of institution of criminal proceedings the applicability of the rule will not be made to depend on any nice questions as to whether the facts stated in the defamatory communication actually constitute a crime in the law of Scotland, provided they are matter which might reasonably be considered appropriate for investigation and consideration by the proper criminal authorities.[10] But if the proceedings are entirely irregular or unusual or outwith the scope of the duty, the protection of this rule does not apply to them.[11] The rule is not appropriate to cases founded on medical certificates of insanity granted under the Lunacy Acts. Such certificates are not

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[1] *Jack* v. *Fleming*, 1891, 19 R. 1.
[2] *A.* v. *B.*, 1895, 22 R. 984.
[3] *Hill* v. *Thomson*, 1892, 19 R. 377.
[4] See para. 1148, *supra*.
[5] *Marianski* v. *Henderson*, 1841, 3 D. 1036; *M'Intosh* v. *Flowerdew*, 1851, 13 D. 726; *Milne* v. *Smiths*, 1892, 20 R. 95; *Webster* v. *Paterson & Sons*, 1910 S.C. 459; *Mitchell* v. *Smith*, 1919 S.C. 664.
[6] *Shields* v. *Shearer*, 1914 S.C. (H.L.) 33.
[7] *Malcolm* v. *Duncan*, 1897, 24 R. 747; *Graham* v. *Strathern*, 1924 S.C. 699.
[8] *Nelson* v. *Black and Morrison*, 1866, 4 M. 328.
[9] *Bell* v. *Black and Morrison*, 1865, 3 M. 1026.
[10] *Mills* v. *Kelvin & James White, Ltd.*, 1913 S.C. 521; *Rae* v. *Scottish Society for Prevention of Cruelty to Children*, 1924 S.C. 102.
[11] *Smith* v. *Innes*, 1827, 5 S. 364; *M'Crone* v. *Sawers*, 1835, 13 S. 443; *Strang* v. *Strang*, 1849, 11 D. 378; *Bell* v. *Black and Morrison*, *supra*.

necessarily privileged at all.[1] But, whether they are granted under circumstances which create a privilege or not, the pursuer must prove that they were granted without due examination and inquiry,[2] and probably also that the diagnosis was in fact wrong.[3]

(iii) *What constitutes "Probable Cause."*

1156. What constitutes "probable cause" necessarily varies with the circumstances of each case; but it may be said in general that to constitute "want of probable cause" it must be shewn that the information possessed by the defender was "such that it could not have induced the belief in the mind of any reasonable man" that an occasion had arisen for taking the action in question.[4] Thus it is not sufficient that a person merely failed to make adequate investigations into the facts, or, in other words, failed to make certain of securing a conviction before preferring a criminal charge.[5] And before giving information to the appropriate authorities, criminal or other, it is sufficient that the information in his possession showed the existence of a state of facts suitable for investigation by them.[6] An informer has probable cause if he merely places reliance on his own memory and the evidence of his own eyesight in identifying the person who committed a crime, and he does not require to go beyond these and make inquiries to confirm an honest belief before taking action.[7]

(iv) *How Pleaded and Proved.*

1157. Want of probable cause must, in the cases which raise the question, be averred on record,[8] and must also go in the issue. If it can be set out specifically on record this should be done;[9] but, as it is a negative, this can seldom be done, and an averment will be relevant which contains the general statement that the defender acted without probable cause, and which does not contain any facts inconsistent with this general statement,[10] and it may be partly proved by the defender's inability to shew probable cause.[11] Any facts relevant to instruct probable cause may be averred and proved in defence even though they be not directly connected with the immediate occasion of the acts out

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[1] See para. 1141, *supra*. [2] See paras. 1114 and 1126, *supra*. [3] See para. 1128, *supra*.

[4] See per Lord Salvesen in *Chalmers* v. *Barclay, Perkins & Co., Ltd.*, 1912 S.C. 521, at p. 532.

[5] *Chalmers* v. *Barclay, Perkins & Co., Ltd.*, *supra*.

[6] *Murray* v. *Wyllie*, 1916 S.C. 356; *Rae* v. *Scottish Society for Prevention of Cruelty to Children*, 1924 S.C. 102.

[7] *Lightbody* v. *Gordon*, 1882, 9 R. 934; *Hassan* v. *Paterson*, 1885, 12 R. 1164.

[8] *James* v. *Baird*, 1916 S.C. (H.L.) 158, per Lord Kinnear at p. 166.

[9] See *e.g. Brown* v. *Fraser*, 1906, 8 F. 1000; *Rae* v. *Scottish Society for Prevention of Cruelty to Children*, *supra*.

[10] *Craig* v. *Peebles*, 1876, 3 R. 441; *Urquhart* v. *M'Kenzie*, 1886, 14 R. 18; *Hill* v. *Thomson*, 1892, 19 R. 377; *Douglas* v. *Main*, 1893, 20 R. 793; *Rae* v. *Scottish Society for Prevention of Cruelty to Children*, *supra*.

[11] Per Lord Pres. Inglis in *Craig* v. *Peebles*, *supra*, at p. 445.

of which the claim for reparation arises.[1] Assuming the averments to be relevant, it is for the jury to decide what facts are proved, but it is for the judge to decide, and to direct the jury, whether these facts sufficiently constitute "probable cause." [2]

Section 17.—Issues.

Subsection (1).—*General Form.*

1158. Actions of damages for defamation, when brought in the Court of Session, are normally [3] appropriated for trial by jury; [4] and the question which is to be put to the jury requires to be expressed in an issue. There are a few specialties in regard to an issue of defamation which should be noticed. There is no prescribed formula for expressing the various questions which must be put in it; but certain expressions have acquired the sanction of usage, and the Court will be slow to recognise any novelties in the forms of issue.[5] The usual practice is to ask whether the defender "falsely and calumniously" uttered the slander complained of, although the inclusion of the word "falsely" seems illogical since the falsity of the statement is presumed from its defamatory import, while malice, which is also presumed, is treated in the issue in the reverse way.

Subsection (2).—*Malice.*

1159. If no question of privilege arises on the pursuer's own averments, the issue contains no reference to malice, malice being inferred from the defamatory import of the statement complained of; but if the pursuer's averments shew that the defamatory words were uttered on a privileged occasion,[6] the issue must ask whether they were used "maliciously." If they were uttered by a litigant in the course of judicial proceedings, unless they were clearly impertinent to the proceedings, they are *prima facie* privileged as a "judicial slander," [7] and "malice" must go in the issue, the question whether the statements were in fact pertinent or not being reserved for the judge's direction to the jury at the trial.[8]

Subsection (3).—*Probable Cause.*

1160. If the words were used on an occasion when want of probable cause requires to be proved,[9] "without probable cause" must also be

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[1] *Kufner* v. *Berstecher*, 1907 S.C. 797.

[2] *Urquhart* v. *Dick*, 1865, 3 M. 932.

[3] There is a statutory exception in the case of actions founded on certificates of insanity under the Lunacy Acts. See 29 & 30 Vict. c. 51, s. 24.

[4] Court of Session Act, 1825, 6 Geo. IV. c. 120, s. 28; Court of Session Act, 1850, 13 & 14 Vict. c. 36, s. 49.

[5] Per Lord Salvesen in *Shields* v. *Shearer*, 1913 S.C. 1012, at p. 1017.

[6] See ss. 15 and 16, *supra*.

[7] See para. 1148, *supra*.

[8] *Mackellar* v. *Duke of Sutherland*, 1859, 21 D. 222.

[9] See paras. 1153 and 1154, *supra*.

added. The issue will then ask whether the defender "falsely, calumniously, maliciously, and without probable cause" uttered the words complained of. In cases founded on a medical diagnosis or a certificate of insanity, whether the occasion was privileged or not, the appropriate form of issue is whether the defender did wrongfully, and without due inquiry and examination, grant the certificate or make the diagnosis.[1]

Subsection (4).—*Privilege arising out of the Defences.*

1161. If the question of privilege does not emerge from the pursuer's own averments, but only arises out of the averments in the defences, the words "maliciously" or "maliciously and without probable cause" should not be inserted in the issue. The pursuer will still be able to prove malice, and want of probable cause also if necessary, at the trial to counter the defender's case of privilege, provided he has relevantly averred them on record.[2]

Subsection (5).—*Several Defenders.*

1162. When there are several defenders the issue usually asks whether "the defenders, or one or other and which of them," uttered the words complained of. Where there was a question as to whether some of the defenders gave instructions to another of them to utter the slander as their agent, an issue was allowed whether "the defenders, or one or other, and which, of them, stated, or caused to be stated" the words complained of;[3] but where there were two defenders, and one was charged only with being art and part in the utterance of the slander by his conduct on the occasion, a separate issue against him asking whether he "concurred in and adopted" the slander, was not allowed, because the issue must ask whether in some way he uttered the slander.[4]

Subsection (6).—*Specification.*

1163. The issue must set forth, either *in gremio* or in a schedule, the defamatory words, and to these is usually added the phrase—"or words of like import and effect." The latter phrase will only cover a slight divergence between the words proved to have been uttered and those sued on.[5] Where the statement was made in a foreign language, both the actual words used and their English equivalent, as averred by the pursuer, must be put in the issue,[6] unless parties are agreed as to the correct translation.[7] The issue must also be specific as to the time, place, and persons in whose presence the slander was uttered.[8] A

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[1] *Strang* v. *Strang*, 1849, 11 D. 378; *Mackintosh* v. *Fraser*, 1859, 21 D. 783.
[2] *Wilson* v. *Purvis*, 1890, 18 R. 72; *Suzor* v. *Buckingham*, 1914 S.C. 299; *Shields* v. *Shearer*, 1914 S.C. (H.L.) 33.
[3] *Goodall* v. *Forbes*, 1909 S.C. 1300.
[4] *Jack* v. *Fleming*, 1891, 19 R. 1.
[5] *Martin* v. *M'Lean*, 1844, 6 D. 981.
[6] *Bernhardt* v. *Abrahams*, 1912 S.C. 748.
[7] *Anderson* v. *Hunter*, 1891, 18 R. 467.
[8] *Walker* v. *Cumming*, 1868, 6 M. 318.

latitude of as much as one month may be allowed in specifying the time,[1] and even wider latitude if repetitions of the slander are alleged.[2] But an issue whether the defender slandered the pursuer "on or about 12th March 1912" will not warrant a verdict that the slander was uttered in February 1912.[3]

Subsection (7).—*Innuendo.*

1164. Where the words complained of require an innuendo [4] to point their slanderous meaning, such innuendo must be set forth in the issue, introduced by such words as "meaning thereby," or "falsely and calumniously representing." Alternative innuendoes are permissible if each one is defamatory.[5] Sometimes a similar form is adopted for the purpose of extracting certain expressions from a long article and inserting them in the issue for the purpose of concentrating the attention of the jury upon the essence of the charge made; [6] but nothing may be put in the issue by way of innuendo which is not specifically averred on record.[7]

Subsection (8).—*Public Ridicule, Hatred, and Contempt.*

1165. An issue whether the statements complained of "were made with the design of exposing, and did expose, the pursuer to public ridicule, hatred, and contempt" may be allowed in suitable [8] cases although the statements complained of are not strictly slanderous; [9] but such an issue is not competent as a mere substitute for an innuendo.[10]

Subsection (9).—*Damages.*

1166. The amount claimed in name of damages is stated in the issue. It is not necessary to put in the issue questions of fact which have been averred and are to be proved merely in aggravation of damages.[11]

Subsection (10).—*Counter-issues.*

1167. At one time various substantive defences, which the defender wished to set up, were put to the jury in the form of counter-issues.

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[1] *Grant* v. *Fraser*, 1870, 8 M. 1011.
[2] *Lockhart* v. *Cumming*, 1852, 14 D. 452.
[3] *Smith* v. *Paton*, 1913 S.C. 1203.
[4] See para. 1120, *supra*.
[5] *M'Culloch* v. *Litt*, 1850, 13 D. 334.
[6] See, *e.g.*, *Wright & Greig* v. *Outram & Co.*, 1889, 16 R. 1004; *Lever Bros., Ltd.* v. *The Daily Record, Glasgow, Ltd.*, 1909 S.C. 1004; *James* v. *Baird*, 1915 S.C. 23, per Lord Pres. Strathclyde at p. 26.
[7] *James* v. *Baird*, 1916 S.C. (H.L.) 158, per Lord Loreburn at p. 163 and Lord Kinnear at p. 165.
[8] See paras. 1116 and 1118, *supra*.
[9] *Sheriff* v. *Wilson*, 1855, 17 D. 528; *MacLaren* v. *Ritchie*, 1856, reported in Glegg on Reparation, 2nd ed., p. 611; *Paterson* v. *Welch*, 1893, 20 R. 744; *Andrew* v. *Macara*, 1917 S.C. 247.
[10] *Lever Bros., Ltd.* v. *The Daily Record, Glasgow, Ltd.*, *supra*.
[11] *Cunningham* v. *Duncan & Jamieson*, 1889, 16 R. 383.

All such counter-issues are now obsolete except that of *veritas*. It is an invariable rule that evidence in support of the truth of the slander will not be admitted at the trial, either in defence against the action or in mitigation of damages, unless the defender has put before the jury a counter-issue, asking whether the defamatory implications are true,[1] although, without a counter-issue, evidence may be led, in mitigation of damages, as to the reputation of the pursuer,[2] or as to the defender having heard reports corresponding to the slander.[3] And where the slander is privileged, and malice has to be put in the issue, the defender may, without a counter-issue, prove the truth of the words actually ascribed to him, for the purpose of establishing his *bona fides*, provided the words are in themselves innocent and have been innuendoed with a slanderous meaning which is denied by the defender.[4]

1168. Where a counter-issue is required and taken, there must be averments on record relevant to support it;[5] and, like the issue, it must be specific as to dates, places, persons, etc.;[6] though, where the slander averred is in general terms, a counter-issue in general terms will be allowed provided there are specific facts averred by the defender on record; and proof will be limited to these facts.[7] In cases of holding up to public ridicule, hatred, and contempt, a counter-issue of *veritas* may not always be necessary or appropriate since, if the imputation sued on is not properly slanderous, the onus may be upon the pursuer to prove its falsehood instead of on the defender to prove its truth.[8] The facts put in the counter-issue must fairly and substantially meet the issue so as to amount to a complete justification of the slander, or of the separable part to which the counter-issue relates, including any innuendo put upon it;[9] but it is sufficient if it comes up to the innuendo in the issue even if it does not confirm all the specific charges on which the innuendo is based.[10] If the pursuer has selected certain specific charges only to sue on out of a wider general slander, the counter-issue must be confined to these selected charges.[11]

1169. A counter-issue that the pursuer has also slandered the defender is not competent. If it is merely intended to establish provocation, no counter-issue is required. If it is intended to establish *compensatio injuriarum*, such an issue must be raised in a separate action, and the

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[1] *M'Neill* v. *Rorison*, 1847, 10 D. 15; *Craig* v. *Jex-Blake*, 1871, 9 M. 973; *Paul* v. *Jackson*, 1884, 11 R. 460.

[2] *C.* v. *M.*, 1923 S.C. 1.

[3] *Marshall* v. *Renwick*, 1835, 13 S. 1127; *Paul* v. *Jackson*, *supra*.

[4] *Henderson* v. *Russell*, 1895, 23 R. 25.

[5] *Burnet* v. *Gow*, 1896, 24 R. 156; *Goodall* v. *Forbes*, 1909 S.C. 1300.

[6] *M'Rostie* v. *Ironside*, 1849, 12 D. 74; *Bertram* v. *Pace*, 1885, 12 R. 798.

[7] *Hunter* v. *MacNaughton*, 1894, 21 R. 850; *Goodall* v. *Forbes*, 1909 S.C. 1300.

[8] *Paterson* v. *Welch*, 1893, 20 R. 774; *Andrew* v. *Macara*, 1917 S.C. 247.

[9] *Lowe* v. *Taylor*, 1844, 7 D. 117; *Beattie* v. *Mather*, 1860, 22 D. 952; *Harkes* v. *Mowat*, 1862, 24 D. 701; *Carmichael* v. *Cowan*, 1862, 1 M. 204; *Kiellar* v. *Mailler*, 1866, 3 S.L.R. 60; *Bertram* v. *Pace*, 1885, 12 R. 798; *Blasquez* v. *Lothians Racing Club*, 1889, 16 R. 893; *Macleod* v. *Marshall*, 1891, 18 R. 811; *Milne* v. *Walker*, 1893, 21 R. 155; *Burnet* v. *Gow*, 1896, 24 R. 156; *British Workman's and General Assurance Co.* v. *Stewart*, 1897, 24 R. 624; *A.* v. *B.*, 1899, 36 S.L.R. 533; see also paras. 1128 and 1129, *supra*.

[10] *Christie* v. *Craik*, 1900, 2 F. 380.

[11] *Powell* v. *Long*, 1896, 23 R. 534.

actions may then both be tried by the same jury if this course is appropriate.[1]

Section 18.—Expenses.

Subsection (1).—*Vindication of Character.*

1170. The general rules of law applicable to expenses [2] are modified by two specialties in cases of defamation. The first is that by the Court of Session Act, 1868,[3] s. 40, a pursuer who recovers by the verdict of a jury less than £5 of damages shall not be entitled to recover his expenses unless the judge before whom the verdict is obtained shall certify "that the action was brought for the vindication of character, and was in his opinion fit to be tried in the Court of Session." But if such a certificate is granted the pursuer will be awarded expenses even if the jury only award one farthing of damages.[4] On the other hand, even if the jury only award purely nominal damages, and even if no such certificate has been granted, the defender will not be awarded expenses against the pursuer.[5] There is no exception in the case of slander actions to the ordinary rule as to the finding of caution by an undischarged bankrupt as a condition of pursuing an action,[6] or to the rule that a pauper must either sue *in forma pauperis* or find caution for expenses.[7]

Subsection (2).—*Apology.*

1171. The second specialty as regards expenses in slander actions is that the general rule as to a judicial tender having the effect of depriving a successful pursuer of his expenses after the date of tender in the event of his being awarded less than the amount of the tender, suffers the exception that a tender will not have this effect unless it is accompanied by an adequate retraction and apology which covers not only the actual statement alleged but also any innuendo put upon it; [8] but, as the defender is entitled to reserve his pleas, he is not bound to admit that he made the statement founded on nor that, if made, it bore the innuendo put upon it by the pursuer. His apology, in consequence, may take a hypothetical form without prejudicing the effect of the tender.[9]

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[1] *Tullis* v. *Crichton*, 1850, 12 D. 867; *Bertram* v. *Pace*, 1885, 12 R. 798.

[2] See Expenses.

[3] 31 & 32 Vict. c. 100.

[4] *Balfour* v. *Wallace*, 1853, 16 D. 110; *Faulkes* v. *Park*, 1854, 17 D. 247; *Graham* v. *Napier*, 1874, 1 R. 391; *Bonnar* v. *Roden*, 1887, 14 R. 761; *Macmillan* v. *Wilson*, 1887, 15 R. 6; *Winn* v. *Quillan*, 1899, 2 F. 322; *Dawson* v. *Giffen*, 1915, 2 S.L.T. 256; 53 S.L.R. 48.

[5] *Bradley* v. *Menley & James, Ltd.*, 1913 S.C. 923.

[6] *Clarke* v. *Muller*, 1884, 11 R. 418; *Scott* v. *Johnston*, 1885, 12 R. 1022; *Scott* v. *Roy*, 1886, 13 R. 1173; *Cook* v. *Kinghorn* (O.H.), 1904, 12 S.L.T. 186; *Miller* v. *J. M. Smith, Ltd.* (O.H.), 1908, 16 S.L.T. 268; *Briggs* v. *Amalgamated Press, Ltd.* (O.H.), 1910, 2 S.L.T. 298.

[7] *Fraser* v. *Mackintosh* (O.H.), 1901, 9 S.L.T. 117.

[8] *Faulkes* v. *Park*, *supra*.

[9] *Mitchells* v. *Nicoll*, 1890, 17 R. 795; *Sproll* v. *Walker*, 1899, 2 F. 73; *Hunter* v. *Russell*, 1901, 3 F. 596; *Malcolm* v. *Moore*, 1901, 4 F. 23; *Sturrock* v. *Deas & Co.* (O.H.), 1913, 1 S.L.T. 60; *Davidson* v. *Panti*, 1915, 1 S.L.T. 273.

DEFAULT.

See PRACTICE AND PROCEDURE.

DEFEASANCE.

See VESTING IN SUCCESSION.

DEFECTIVE CHILDREN.

See EDUCATION.

DEFENCES.
DEFENDER.

See PRACTICE AND PROCEDURE.

DEFORCEMENT.
DEFRAUDING OF CREDITORS.

See CRIME.

DEFRAUDING THE REVENUE.

See CRIME; CUSTOMS; EXCHEQUER; EXCISE.

DEGREE OF KINSHIP.

See CRIME; DECLINATURE; KINSHIP; MARRIAGE.

DEL CREDERE.

See AGENCY.

DELECTUS PERSONÆ.

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Section 1.—Definition and General Principles.

1172. *Delectus personæ*, literally "choice of person," is a phrase mainly used in connection with contracts as transmissible rights. It denotes a doctrine of the law of Scotland that where the parties to a contract —or one of them—have been selected on account of personal qualifications or suitability they may not assign the contract to others. The doctrine finds its readiest and most general application in contracts of lease, partnership, and service; but it finds a place in miscellaneous contracts also, where special skill has been relied on or where reciprocal obligations have been undertaken not merely involving money payments on either side. The phrase has also been extended to cover certain aspects of the maxim *delegatus non potest delegare*, and where persons have been chosen for certain offices or given certain definite powers, it is used to denote that the personal qualification operates to exclude delegation of the duties of those offices or the exercise of the particular powers by others. Such officers include trustees holding discretionary powers, and donees of powers, the holders of patronage and the like.

1173. The assignability of contracts where there is an element of *delectus personæ* has been the subject of some loose general expressions of judicial opinion in which sufficient regard has not been had to entirely different sets of circumstances in which the questions can arise. There are contracts in which there can be (1) no valid assignation on either side, and (2) valid assignation on one side, but not on the other. The simplest examples of contracts in which there can be no valid assignation (without special consent) are contracts of personal service between masters and certain servants. There is a *delectus personæ* by the master of his servant and equally a *delectus* by the servant of the master. We shall notice later within what limits this doctrine of personal service operates. Into this class also fall contracts in which there are certain

kinds of reciprocal obligations, obligations not merely involving a payment of money on either side. Here, too, an examination of the reciprocal obligations must be entered upon, in order to ascertain the limits of the principle of non-assignability.

1174. The simplest example of the class of case in which *delectus personæ* operates only to prevent assignation on one side is the case of a lease, where there is *delectus personæ* of the lessee but not of the lessor. Another instance is that where skill in execution is looked to on the one side but a mere payment of money has to be made on the other, as where an artist is commissioned to paint a picture (say a landscape) for a sum of money, to be paid by the other contracting party. The *delectus* is of the performer, and not of the receiver of the work. In this class of case there must be an element of skill demonstrable as being involved in the doing of the work, such as to distinguish it from performance of ordinary manual or artizan labour.

1175. The doctrine of *delectus personæ* is sometimes loosely introduced in regard to contracts where performance through a substitute is offered, the original obligant remaining bound for due fulfilment of the contract. But the real issue raised in such cases is whether the obligee is getting what he bargained for. The two classes of case, however, are difficult to distinguish where questions are raised as to the right of the trustee in bankruptcy to have substituted performance accepted, the bankrupt's estate remaining liable until due implement is made. Performance through a substitute cannot be enforced on the obligee where, the special skill of the bankrupt having been relied on by the other contracting party, the bankrupt is incapacitated from performing his due part, *e.g.*, where in a commercial contract the bankrupt's skill in selecting or buying materials for the contract is relied on as their sole test of quality, the trustee is not entitled to implement the contract by tendering goods selected by another, even although the substitute is deemed to have skill equal to that of the bankrupt.[1]

Section 2.—In Contract.

1176. Like all implied conditions in contract this doctrine applies only in the absence of express stipulation between the parties; and, accordingly, cases arising out of express stipulation will be noticed in this article only where the decision involves or illustrates the general principle.

Subsection (1).—*Leases.*

(i) *Leases to which Doctrine applies.*

1177. In the tenancy of rural subjects the law holds that the tenant is chosen for personal reasons, and may not, therefore, under a lease

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[1] Cf. *Cole* v. *C. H. Handasyde & Co.*, 1910 S.C. 68.

of ordinary duration, assign or sublet his holding without the express consent of the landlord.[1] The origin of this principle, as applied to leases, is to be found partly in the necessity formerly existing for preventing powerful and unscrupulous persons from obtaining lawful possession, as assignees, of land they desired ultimately to annex; and partly on account of the military service which the tenants were bound to render to their landlord. But the doctrine is now maintained on the presumption of the lessee's qualifications, pecuniary credit, agricultural skill, and desirability as a neighbour.[2] This principle was formerly held to exclude both the heir of a deceasing tenant and also adjudgers, *i.e.* assignees who come in, not by the favour of the tenant, but by the operation of law. It is now settled that the doctrine applies only to voluntary alienations, and does not exclude heirs [3] or adjudgers where there is no express exclusion of assignees.[4] "A lease of shootings implies *delectus personæ* in a sense perhaps more emphatic than any other kind of lease," [5] and, accordingly, leases of sporting subjects may not be assigned or sublet without the landlord's consent. *Delectus personæ* is also implied in a lease of minerals.[6]

1178. Where a lease contains a clause excluding assignees or subtenants unless approved of by the landlord, or admitting them if approved by him, it is now settled, reversing former decisions, that the landlord may withhold his approval arbitrarily and without assigning a reason.[7] Where, under such a clause, a lease was assigned with the landlord's consent, it was held incompetent for the assignee to retrocess to the original tenant without the landlord's consent.[8] In *Dewar* v. *Ainslie* [9] Lord Young expressed an opinion *obiter* that a trustee under a voluntary trust deed was not an assignee but a manager for the bankrupt. Lord Rutherfurd Clark, however, thought that the trustee was an assignee.

The right of objecting to an assignation or sublease on this ground is personal to the landlord, and no one else can found on it.[10] But where trustees under a general disposition attempted to take pos-

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[1] *Hume* v. *Lyell*, 1680, Mor. 10391; *Earl of Peterborough* v. *Milne*, 1791, Mor. 15293; Ersk. Inst. ii. 6, 31; Hunter on Landlord and Tenant, i. 218, 236; Rankine on Leases, 3rd ed., chaps. viii. and ix.; Bell's Prin., ss. 1214 *et seq.*

[2] Hunter on Landlord and Tenant, i. 218.

[3] *Thomson* v. *Watson*, 1750, Mor. 10337; Bell's Prin., s. 1219; Hunter on Landlord and Tenant, i. 219.

[4] *Elliot* v. *Duke of Buccleuch*, 1747, Mor. 10329; Ersk. Inst. ii. 6, 32; Bell's Prin., s. 1216.

[5] *Earl of Fife* v. *Wilson*, 1864, 3 M. 323, per Lord Kinloch at p. 324; Rankine on Leases, 3rd ed., 506.

[6] *Duke of Portland* v. *Baird & Co.*, 1865, 4 M. 10, *obiter* per Lord Justice-Clerk Inglis at p. 18, and Lord Neaves at p. 22.

[7] *Muir* v. *Wilson*, 20th January 1820, F.C.; Bell on Leases, 4th ed., i. 81; *Wight* v. *Earl of Hopetoun*, 1855, 17 D. 364; *Stewart* v. *Rutherford*, 1863, 35 Sc. Jur. 307; *Duke of Portland* v. *Baird & Co.*, 1865, 4 M. 10 (mineral lease).

[8] *Ramsay* v. *The Commercial Bank of Scotland*, 1842, 4 D. 405.

[9] 1892, 20 R. 203, per Lord Young at p. 209.

[10] *Hay & Wood*, 1801, Mor. 15297; *Dobie* v. *Marquis of Lothian*, 1864, 2 M. 788.

session under a lease with a clause excluding assignees, the Court held that the heir of the truster might sue without concurrence of the landlord.[1]

(ii) *Leases to which Doctrine does not apply.*

1179. In leases of urban subjects no *delectus personæ* is implied, and the tenant may therefore assign or sublet, unless expressly prohibited from doing so.[2] In this connection an urban subject is defined as a house, shop, or building of any sort, wherever situated. There are, of course, buildings on rural subjects, and gardens surrounding certain residences, but these take the essential character of the principal subjects, to which they are mere accessories.[3] The tenant cannot alter the essential character of a subject.[4]

1180. Leases of unusual duration are held not to imply *delectus personæ*, and may therefore be assigned or sublet, unless the contrary is stipulated; and a prohibition of assignation will not imply a prohibition of subletting, nor *vice versa*. This is true of both agricultural and mineral leases.[5] The ordinary duration of a farm lease is considered to be nineteen or twenty-one years.[6] Thirty-eight years has been held an unusual duration;[7] but there is no actual decision as to any lease for more than twenty-one, and less than thirty-eight, years. A lease for a liferent is assignable as of unusual duration;[8] and in *Pringle's* case[9] a lease to a minister for the period of his incumbency was held assignable for the same reason. There is no actual decision as to the ordinary duration of a mineral lease, but from the remarks of Lord Cowan and Lord Neaves in *Duke of Portland*[10] and from the analogy of the Rosebery Act[11] which empowers heirs of entail in possession to grant mineral leases of that duration, it is thought that thirty-one years would be the limit of ordinary mineral leases.[12]

1181. There is no *delectus personæ* of the lessor.[13]

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[1] *Murdoch* v *Murdoch's Trs.*, 1863, 1 M. 330.

[2] Bell, Com. i. 73, ii. 32; Bell's Prin., s. 1274; Ersk. Inst. ii. 6, 32, note; *Aitchison* v. *Benny*, 1748 Mor. 10405; *Anderson* v. *Alexander*, 10th July 1811, F.C., but see *Gordon* v *Crawford*, 1825, 4 S. 95 (N.E. 97).

[3] Rankine on Leases, 3rd ed., 174.

[4] *Anderson* v. *Alexander*, 10th July 1811, F.C.; *Leechman* v. *Sievwright*, 1826, 4 S. 683 (N.E. 690); *Leck* v. *Fulton*, 1855, 17 D. 408; *Hood* v. *Miller*, 1855, 17 D. 411.

[5] Bell, Com. i. 73; *Simson* v. *Gray & Webster*, 1794, Mor. 15294; *Duke of Portland.* v *Baird & Co.*, 1865, 4 M. 10; *Trotter* v. *Dennis*, 1770, Mor. 15282.

[6] *Alison* v. *Proudfoot & Litster*, 1788, Mor. 15290; *Earl of Peterborough* v. *Milne*, 1791, Mor. 15293; *Earl of Cassilis* v. *Macadam*, 1806, Mor. App. "Tack," No. 14.

[7] *Simson* v. *Gray & Webster*, *supra*.

[8] Stair, ii. 9, 26; Ersk. Inst. ii. 6, 32; *Hume* v. *Craw*, 1637, Mor. 10371.

[9] *Pringle* v. *M'Lagan*, 1802, Hume 808.

[10] *Duke of Portland* v. *Baird & Co.*, 1865, 4 M. 10, per Lord Cowan and Lord Neaves.

[11] 6 & 7 Will. IV. c. 42, s. 1.

[12] Rankine on Leases, 3rd ed., 176.

[13] *Reid's Trs.* v. *Watson's Trs.*, 1896, 23 R. 636, per Lord Young and Lord Kyllachy.

SUBSECTION (2).—*Partnership.*

1182. The relation between partners is so intimate, and mutual reliance so necessary, that the principle of *delectus personæ* applies very strictly between partners. Unless by express consent of all the existing partners, no new partner can be introduced into the firm, not even the trustee on the estate of a partner who becomes bankrupt, nor the representatives of one who dies. A partner may assign his share of the profits of the concern, but the assignee can acquire thereby no right to inspect the books of the firm or to share in the deliberations or decisions of the partners. Our law differs from the Roman in recognising as competent stipulations in the contract of copartnery that the heir or assignee of any, or all, of the partners is to be assumed into the firm in such partner's place. The effect of such a clause is practically equivalent to a renunciation by the partners of their *delectus personæ.*[1] Since the *delectus personæ* applies to the partnership as a whole, and there is but one contract amongst all the partners, it follows that the partnership may, in the absence of contrary stipulations, be dissolved at any time by the retiral or death of any partner, but if the parties agree that the partnership shall endure beyond the limits of their own lives, it will not be dissolved by death, but will be binding on the representatives of the deceaser.[2]

1183. The effect of an assignment by one partner to another of his interest in the concern, or part thereof, was considered in *Cassells* v. *Stewart.*[3] The argument that the assignor was not entitled, by diminishing his pecuniary interest in the concern, to lessen his motives for diligence in its affairs, was negatived by the Court; and the question whether the assignee was entitled, without the consent of the remaining partners, to acquire a preponderating voice in the management, was raised, but was not expressly decided.[4] The law relating to partnerships was consolidated by the Partnership Act, 1890.[5] The only section which need be referred to here is the 31st, dealing with "rights of assignee of share in partnership." It practically re-enacts the law as stated above.[6]

SUBSECTION (3).—*Contracts of Service.*

1184. In contracts of service the personality of the contracting parties is vital to the contract *ex sua natura*, and the substitution of third parties is not allowable unless expressly provided for. A master, therefore, cannot assign the services of his domestics, workmen, or other employees to third persons, nor can the servant substitute others to do his part

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[1] Clark on Partnership, pp. 141 and 342; Stair, i. 16, 5; Bell, Com. ii. 508; Bell's Prin., s. 358; *Warner* v. *Cunninghame*, 1798, Mor. 14603; affd. 3 Dow 76.

[2] Stair, i. 16, 5; Clark on Partnership, 663; *Hill* v. *Wylie*, 1865, 3 M. 541; *Beveridge* v. *Beveridge*, 1869, 7 M. 1034.

[3] 1879, 6 R. 936; affd. 1881, 8 R. (H.L.) 1.

[4] *Cassells* v. *Stewart*, 1879, 6 R. 936, at pp. 943 and 955.

[5] 53 & 54 Vict. c. 39.

[6] See Lindley on Partnership, 9th ed., p. 448 *et seq.*

of the contract.[1] The same doctrine has been applied to boarding contracts between lodgers and landladies [2] which involve personal supervision. Although this doctrine was admitted in *The Berlitz School of Languages, Ltd.* v. *Duchêne* [3] it was argued that a stipulation contained in the contract of service, to the effect of preventing the servant teaching in competition with the master's schools, could be separately assigned; but this was negatived by the Court.

1185. Dissolution of a partnership may involve the termination of contractual rights of service, and the conversion of a business from individual or partnership ownership to that of a limited company may have a like effect. Such changes may operate to prevent assignation of ordinary business contracts in certain circumstances as will be noted later, but in the personal relations of master and servant these changes have more immediate application. In the case of *Duchêne* [4] it was admitted that an agreement to teach in the Berlitz Schools could not be assigned to a limited company which took over the teaching business. In the case of *Hoey* v. *M'Ewan & Auld*,[5] the pursuer entered into an engagement with a firm of accountants consisting of two partners. On one of the partners dying, the remaining partner declined to continue the engagement, and was sued for damages in respect of an alleged breach of contract. The Court held that death having terminated the partnership as employer, no action lay against the survivor, who had a different *persona* from the contracting party. Lord Deas dissented and pointed out the difficulties as regards voluntary and involuntary dissolutions of firms and obligations which did not necessarily come to an end in consequence of changes having been made in a firm.

1186. The character of the contract of service has to be looked to in these cases, and in many instances the actual composition of an employing firm is of no importance at all. For example, where a troupe of music-hall performers engaged with four persons who carried on a music-hall, the Court held that the death of one of the employers did not affect the validity of the contract. His existence or continued existence was of no materiality to the performers. They were not even aware of his existence, for they had contracted through a manager for the music-hall owners.[6] The decision would presumably have been otherwise if one of the performers had died, and the survivors had attempted to force implement on the music-hall owners by introducing a substitute for the dead performer.

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[1] (Apprentice) *Edinburgh Glasshouse Co.* v. *Shaw*, 1789, Mor. 597; (teacher of languages) *Berlitz School of Languages, Ltd.* v. *Duchêne*, 1903, 6 F. 181; (general manager of a newspaper) *Ross* v. *Macfarlane*, 1894, 21 R. 396, per Lord Low (Ordinary) at p. 401.

[2] *Yorke & Co.* v. *Campbell*, 1904, 12 S.L.T. 413.

[3] 1903, 6 F. 181. In this case the pursuer's contention involved the splitting up of an "entire" contract, and the ignoring of reciprocal obligations of a personal character the extension of the ambit of which would have been inequitable.

[4] *Berlitz School of Languages, Ltd.* v. *Duchêne, supra.*

[5] 1867, 5 M. 814.

[6] *Phillips* v. *Alhambra Palace Co.*, [1901] 1 Q.B. 59.

1187. In the case of apprenticeship the master cannot assign the indenture without the apprentice's consent.[1] Where an apprentice binds himself to a firm he must fulfil his indenture to any of the partners who survive if the partnership is not dissolved by such death. If it is, then the law of *Hoey's* case would apply.[2]

Subsection (4).—*Miscellaneous Contracts.*

1188. In the case of miscellaneous contracts the personality of the parties may, or may not, be of such moment as to prevent assignation, and the tests adopted by the Court for discovering the importance of the individual to the contract are: (1) determining whether it is of the essence of the contract that the thing to be done requires special skill, genius, art, or even strict personal supervision,[3] and (2) ascertaining if the contract contains reciprocal obligations, involving more than mere payment of money, for, if so, it is to be presumed that the parties intended to fulfil the counter prestations only to one another, and the degree of skill required for the performance, although of some importance, is less rigidly scrutinised when the obligations are reciprocal.

(i) *The Test of Special Skill to Execute.*

1189. Contracts for the hiring out of work to be done (*locatio operis faciendi*) and contracts of sale, executorial or otherwise, may, or may not, involve *delectus personæ* according to the amount of skill required for the work. If the work involves no higher skill than that of ordinary workmen in the trade, there is nothing to prevent assignation of the contract. Mere delegation of performance of the work to another by the original party does not, as a rule, raise any question of *delectus personæ*, as that doctrine is accurately understood, and sub-contracting may be resorted to in cases in which it may be that the right to assign the contract, so as to free the first obligant, would not be recognised. At all events, where the work to be done involves no higher skill than that of ordinary workmen in the trade, or is of such a simple character as, say, carpet beating,[4] delegation and sub-contracting can be resorted to.

1190. Even in cases where there are reciprocal obligations, not merely involving money payment on either side, if these are clearly not to be performed by any particular individual, the contracts are held assignable. In the *British Waggon Co.* v. *Lea*[5] the obligation on

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[1] *Edinburgh Glasshouse Co.* v. *Shaw*, 1789, Mor. 597.

[2] *Hoey* v. *M'Ewan & Auld*, 1867, 5 M. 814.

[3] See per Lord Neaves in *Anderson* v. *Hamilton & Co.*, 1875, 2 R. 355, at p. 363.

[4] *Stevenson* v. *Maule & Son*, 1920 S.C. 335.

[5] 1880, 5 Q.B.D. 149, per Cockburn L.C.J. at p. 153; see also *Asphaltic Limestone Concrete Co.* v. *Glasgow Corporation*, 1907 S.C. 463, where Lord M'Laren, at p. 475, discusses the case on the basis of there having been an assignation, although it would appear that the question was one as to the right to *delegate* the performance of the duty to upkeep a street to another company, the primary obligant not having claimed any freedom from the obligation originally entered into. *Brown* v. *Canon Co., Ltd.*, 1898, 6 S.L.T. 90.

Lea's side was to take waggons on hire, and on the company to keep them in repair. It is plain that the company, being a juristic person only, could not as an individual do the work, and if the obligation to keep in repair were satisfied, it did not in the least matter whom the company employed to do such ordinary work, and accordingly the contract was held assignable. It is not, of course, suggested that a juristic person cannot undertake reciprocal obligations in which its *persona* is of deliberate choice by the other party, *e.g.* as regards financial transactions, or even the production of an article for which a company has an established reputation. If work does require special skill, or if its planning or supervision is in any way peculiarly personal, as in the case of an architect building a house,[1] the contract is not assignable. It is, however, difficult to find cases in which contracts to do work have been held non-assignable, except where the question at issue also involved reciprocal obligations. Such cases will be afterwards considered. In regard to contracts of sale, reference must be made to two separate categories, viz. (1) contracts with manufacturers, and (2) contracts with dealers.

1191. In regard to contracts with manufacturers for goods of the kind they hold themselves out as making, the Courts of England and Scotland agree that if the articles to be supplied require special skill to manufacture, as in the case of a gun by a well-known maker, the contract cannot be implemented by tendering another make. It would, therefore, appear that the contracting manufacturer is not entitled to assign his obligation to another manufacturer.[2] The law of England extends the same principle to every manufacturer of goods he is asked to supply.[3] In Scotland, however, ordinary manufacturers have been held entitled to fulfil their obligations by supplying goods of other manufacturers,[4] and if they can do so there appears to be nothing to prevent assignation of the contract to the actual suppliers of the goods. The judges have not been unanimous in either Court in their view on this matter, but it is thought that if the question came before the House of Lords, the law as laid down in England would be preferred.

1192. It was made quite clear in the cases referring to contracts with manufacturers [4] that the law both of England and Scotland recognised that in regard to contracts for the supply of goods from dealers who are not manufacturers of such goods there is in general no *delectus personæ* which operates to prevent assignation of the contract to third parties who are to satisfy the obligation to deliver the goods. In *Cole* v. *Handasyde* [5] the contract was one which *ex facie* might have been a manufacturer's, but was admittedly known to have

[1] *Dr Jaeger's Sanitary Woollen System Co., Ltd.* v. *Walker*, 1897, 77 L.T. 180, per Lindley L.J.

[2] *Cole* v. *Handasyde*, 1910 S.C. 68, per Lord Pres. Dunedin at p. 74.

[3] *Johnson* v. *Raylton*, 1881, 7 Q.B.D. 438; *Boulton* v. *Jones*, 1857, 2 H. & N. 564.

[4] *West Stockton Iron Co., Ltd.* v. *Neilson & Maxwell*, 1880, 7 R. 1055; *Johnson & Reay* v. *Nicoll & Son*, 1881, 8 R. 437.

[5] 1910 S.C. 68.

been entered into by a broker who could not himself supply the goods; yet it was alleged that the broker had been specially chosen to implement the contract because of his exceptional trade knowledge, arising from the fact that he had formerly been a manufacturer. It appeared, however, that the contract was for goods up to sample or detailed description, and the Court held that in such a case there is nothing on which a broker could exercise his special skill, for in fulfilling the conditions of the contract he was doing so in his own interest only, the other party not having agreed to accept his selection, but having retained all the usual rights to reject the goods if, in his own opinion, they did not come up to the agreed-on standard.

(ii) *The Test of Reciprocal Obligations.*

1193. Contracts which involve the performance of reciprocal obligations—not being, on either side, merely an obligation to pay money—form a class in which the doctrine of *delectus personæ* has been more strictly applied—that is to say, where there are reciprocal obligations the amount of skill or personal supervision which is to infer *delectus personæ* may be very much less than where there are no reciprocal obligations. But it is probably going too far to say, as Mr Justice Kekewich did: "I should suppose, without reference to any legal principle or legal decision, that a person entering into an engagement of a mutual character—I should perhaps say reciprocal character—with another person, or two or more persons, must be taken to intend that the engagement should be carried out on either side by the parties to the contract, and by the parties to the contract only, and that in the event of one of them being changed by a death or otherwise, the contract itself should necessarily come to an end." [1] Indeed, there seems no reason to doubt that a contract with reciprocal obligations can be assigned if the obligations involve only such skill as an ordinary workman in the trade can exercise.[2] Much appears to depend, however, upon whether the assignation, even in such a case, could be recognised without infringing the other party's rights to implement of the obligations in which he is creditor. There are many contracts containing reciprocal obligations in which it might often lead to inequitable results to allow B. to assign to C., so that C. could sue A. on the contract and force on A. acceptance of C.'s performance, because A. could not force on C. acceptance of A.'s performance as there may be no privity of contract between A. and C.[3]

1194. When the reciprocal obligations have a degree of importance, then it is immaterial that an attempted transmission is to a party but slightly different in fact from the cedent—as in the case of a firm changed by the dropping out of a partner,[4] or turned into a limited

[1] *Dr Jaeger's Sanitary Woollen System Co., Ltd.* v. *Walker*, 1897, 77 L.T. 180, at p. 183.
[2] *British Waggon Co.* v. *Lea*, 1880, 5 Q.B.D. 149.
[3] *International Fibre Syndicate* v. *Dawson*, 1900, 2 F. 636; affd. 1901, 3 F. (H.L.) 32.
[4] *Dr Jaeger's Sanitary Woollen System Co., Ltd.* v. *Walker*, *supra*.

liability company.[1] It is of no moment that the assignee is, in the cedent's opinion, as competent as he is himself to perform the obligations in the contract. In fact the performance of an obligation, say to publish an advertisement in a firm's trade list, cannot be implemented by publishing in the list of a new limited company into which the old firm is converted. The limited company's customers may be different, and the circulation of its list may be in certain respects restricted, or may even be too extensive.[1] A case involving reciprocal obligations in which the doctrine above stated was carried to its greatest length is *Robson* v. *Drummond*,[2] where all the skill required to make a contract purely personal was that required for painting a carriage. A. hired a carriage for a period of years from B. at an annual rent, on condition that B. repaired and painted it at certain intervals. On B.'s retiring from business the successor (who had really been B.'s undisclosed partner all along) was held not to have an enforceable assignment of the contract, as A. was entitled to have the judgment and taste of B., to whom he looked to do the repairs and painting, and in B.'s absence A. was held entitled to refuse a substitute and terminate the hire. This case, although admittedly going to a great length, has been expressly approved, not only in the *British Waggon Co.'s* case [3] but also in the more recent case in the Court of Appeal of *Dr Jaeger's Co.*,[4] which involved reciprocal obligations of greater importance. The effect of reciprocal obligations in preventing assignment is also seen in *Kemp's* case,[5] where the obligation on one side was to meet K.'s requirements of eggs for one year, and on the other hand K. undertook not to buy from any other merchant. To saddle the contracting party with meeting the requirements of "K. Limited" into which K. formed his business, and to which K. attempted to assign the contract, might well have had widely different results from those originally contemplated by the obligants. The facts in *Tolhurst* v. *Associated Portland Cement Manufacturers* [6] point to there being a contract involving reciprocal obligations, but that question does not appear to have been raised. The circumstances of the case were very special, the contract being one for fifty years, which in itself would point to the exclusion of *delectus personæ*. Moreover, the judges differed greatly in opinion, and the case was declared by one of the majority to have no general importance.[7]

1195. In the Scottish Courts the doctrine of non-assignability of contracts involving reciprocal obligations (unfortunately often termed "mutual," although that in no way serves to distinguish them from other bilateral agreements) is equally well recognised. *Grierson, Oldham & Co.'s* case [1] shews that where the reciprocal stipulations cannot

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[1] *Grierson, Oldham & Co., Ltd.* v. *Forbes, Maxwell & Co., Ltd.*, 1895, 22 R. 813.
[2] 1831, 2 B. & A. 303.
[3] *British Waggon Co.* v. *Lea*, 1880, 5 Q.B.D. 149.
[4] *Dr Jaeger's Sanitary Woollen System Co., Ltd.* v. *Walker*, 1897, 77 L.T. 188.
[5] *Kemp* v. *Baerselman*, [1906] 2 K.B. 604.
[6] [1903] A.C. 414.
[7] Per Lord Macnaghten at p. 417.

be said to be equally well carried out by any ordinary workman in the trade, the assignment of a contract containing such stipulations cannot be upheld. It is, perhaps, unfortunate that the Lord Justice-Clerk (Kingsburgh) selects the case of *Boulton* v. *Jones* [1] as an authority for the proposition that mutual contracts cannot be assigned, for in it there was no question of reciprocal stipulations. *Boulton* v. *Jones* [1] belongs to the class of English cases in which manufacturers of ordinary marketable commodities are held bound to supply goods of their own manufacture—a view which, as we have noticed above, is not accepted in Scotland. The Lord Ordinary (Kincairney) in *Grierson's* case,[2] however, who was expressly affirmed, in an exhaustive discussion of the case treats *Grierson, Oldham & Co.'s* contract as being non-assignable on account of the reciprocal stipulations in it, and the case of *Robson* v. *Drummond* [3] which he mentions would have been a more apt reference by the Lord Justice-Clerk. Doubts have been expressed [4] as to whether *Grierson, Oldham & Co.'s* case involved reciprocal obligations, but as the obligation on the one side was to supply advertising matter for publication in X.'s trade list, and on the other side to publish these advertisements by sending the list to X.'s customers, it would appear that the facts furnish an excellent example of reciprocal obligations not merely involving payment of money. It was in these circumstances that the original contracting parties were deemed to have been mutually chosen for reasons peculiar to each. *The International Fibre Syndicate, Ltd.* v. *Dawson* [5] is a further example of the non-assignability of a mutual contract. So also a contract conferring a right to quarry stones was held to involve *delectus personæ*, because the quarrier and the proprietor had reciprocal obligations.[6] Another example of a non-assignable contract, where there were reciprocal obligations, is *Rodger* v. *Herbertson*,[7] a contract of sale of the goodwill of a medical practice, although the Court founded its judgment on *delectus personæ* ascertainable from the terms of the agreement, without noticing that the proof of *delectus* was all found in the reciprocality. That feature distinguishes *Rodger's* case from *Fraser & Son* v. *Renwick*,[8] where there were no reciprocal obligations, and the contract passed to an assignee.

Section 3.—In Trusteeship.

1196. The power of assuming new trustees and appointing factors, which by the Trusts Acts is conferred on all gratuitous trustees, implies

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[1] 1857, 2 H. & N. 564.
[2] *Grierson, Oldham & Co., Ltd.* v. *Forbes, Maxwell & Co., Ltd.*, 1895, 22 R. 813.
[3] 1831, 2 B. & A. 303.
[4] Gloag on Contract, p. 460.
[5] 1900, 2 F. 636; affd. 1901, 3 F. (H.L.) 32.
[6] *Mags. of Arbroath* v. *Strachan's Trs.*, 1842, 4 D. 538.
[7] 1909 S.C. 256.
[8] 1906, 14 S.L.T. 443. It is useful to compare the decisions in the English Court with those referred to, and in particular *Jacoby* v. *Whitmere*, 1883, 49 L.T. (N.S.) 335; *Townsend* v. *Jarman*, [1900] 2 Ch. 698; and *Leetham & Sons, Ltd.* v. *Johnstone White*, [1907] 1 Ch. 322.

that the ordinary duties of trust administration involve no special *delectus personæ*. But it is otherwise where the powers given to trustees involve the exercise of individual discretion. In such a case the Court will not extend such powers to assumed trustees, or to judicial factors appointed on the trust estate. Much weight will be given to the terms of the deed constituting the trust. Where the Court is satisfied that the truster did not intend the discretionary power to be exercised by anyone other than the original trustee in whom he expressed particular confidence, it will refuse to sanction its exercise by a trustee assumed under the provisions of the Trusts Acts.[1] Lord M'Laren in the case of *Robbie's Judicial Factor* in 1893 said: "When the individual to be benefited is pointed out by name, and the discretion conferred on the trustees is merely a discretion to increase the income of the beneficiary or to make over the capital fund of which the beneficiary has enjoyed the income . . . the devolution of such a discretion to new trustees, or to a judicial factor, may be represented as an act of ordinary jurisdiction, not involving the exercise of any arbitrary power by the Court. . . . Yet, so far as I can find, this has only been done in cases where the testator has provided that the discretionary power might be exercised by assumed trustees not chosen by himself." [2]

1197. There has been, however, in recent years a widening of view in regard to the necessity for the testator providing for the exercise of the powers by assumed trustees, and it has been held that where the deed constituting the trust clearly shews that the truster contemplated the exercise of powers by assumed trustees, the Court can sanction the exercise of such discretion by assumed trustees, or even by trustees appointed by the Court.[3] In the case of *Shedden's Trs.*,[4] Lord President Strathclyde held that in order to prevent such an exercise by assumed trustees, the deed of trust would have to contain terms prohibiting them from so acting. As regards the difficulties previously raised concerning the position of judicial factors as not being within the purview of the testator, in connection with the exercise of discretionary powers, the law has been put on a conclusive basis by the Trusts Act of 1921,[5] which provides that a judicial factor is to be deemed a trustee. The Court has accordingly held [6] that, as a judicial factor has all the powers of a trustee nominated, assumed or appointed,[7] he can, unless prohibited, expressly or by clear implication, from exercising discretionary powers, do so, at all events where intestacy would

[1] *Hill's Trs.* v. *Thomson*, 1874, 2 R. 68.

[2] *Robbie's Judicial Factor* v. *Macrae*, 1893, 20 R. 358, per Lord M'Laren at p. 362, who referred to *Allan, Petr.* (*sub nom. Mackay* v. *Ewing*), 1867, 5 M. 1004 and in 1869, 8 M. 139, and to *Hill's Trs.* v. *Thomson*, 1874, 2 R. 68, and *Simson*, 1883, 10 R. 540; see also *Nisbet* v. *Tod*, 1848, 10 D. 361; *Auld, Petr.*, 1856, 18 D. 487.

[3] *Brown's Trs.* v. *Young*, 1898, 6 S.L.T. 32; *Dick's Trs.* v. *Dick*, 1906, 14 S.L.T. 325.

[4] *Shedden's Tr.* v. *Dykes*, 1914 S.C. 106, followed in *M'Credie's Trs.* v. *M'Credie*, 1915, 1 S.L.T. 410; *Miln's Trs.* v. *Drachenhauer*, 1921, 1 S.L.T. 152.

[5] 11 & 12 Geo. V. c. 58, s. 2.

[6] *Woodard's Judicial Factor* v. *Woodard's Exrx.*, 1926 S.C. 534.

[7] *Leslie's Judicial Factor*, 1925 S.C. 464.

result from the non-exercise or where charitable trusts are involved. Where it is plain, however, that a power of selecting the objects of the testator's bounty is personal to the original trustees, the principles of *Robbie's Judicial Factor* [1] will be followed. Where the objects of the testator's bounty are selected, and the discretion of the trustees is only as to apportionment among the objects, trustees appointed by the Court may be allowed to exercise that discretion.[2]

1198. It is not competent for a father to delegate his powers of appointing tutors and curators to his children; so where a testator appoints his trustees to be tutors or curators to any children whom he may leave in pupillarity or minority, the appointment is good only as regards his original trustees, and not as regards assumed trustees.[3]

Section 4.—In Privileges.

1199. Patronage rights and similar privileges have been held to be not assignable in respect of their purely personal character.[4] Permission by a harbour authority to a shipping company to erect a pier within the harbour limit has been held to be an unassignable right.[5]

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[1] *Robbie's Judicial Factor* v. *Macrae*, 1893, 20 R. 358; see *Goudie* v. *Forbes*, 1904, 12 S.L.T. 377; *Laurie* v. *Brown*, 1911, 1 S.L.T. 84; *Howden* v. *Simson*, 1895, 23 R. 113.

[2] *Grieve's Trs.* v. *Wilson*, 1904, 12 S.L.T. 347.

[3] *Walker* v. *Stronach*, 1874, 2 R. 120; 12 S.L.R. 100.

[4] *H.M. Advocate* v. *Mags. of Stirling*, 1846, 8 D. 450.

[5] *Leith Dock Commrs.* v. *Colonial Life Assurance Co.*, 1861, 24 D. 64.

DELEGATION.

See OBLIGATION.

DELEGATUS NON POTEST DELEGARE.

See AGENCY; CORPORATIONS; DELECTUS PERSONÆ; MAXIMS.

DELETIONS.

See CRIME; DEEDS, EXECUTION OF.

DELICT.

See DAMAGES; NEGLIGENCE; REPARATION.

DELIVERY OF DEEDS.

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Section 1.—Introductory.

1200. It is not intended to treat in this article of any matter other than of what constitutes delivery of a deed. For detailed consideration of questions relating to the necessity, in particular instances, of delivery or to the mode of proof or sufficiency of evidence in relation to questions of delivery, reference should be made to Donation, Evidence, and to the articles dealing with particular contracts.

1201. Deeds are granted, generally speaking, either in implement of an obligation or in furtherance of a design or object not obligatory in character. A deed duly executed is presumptive evidence of the intention of the granter to implement the deed according to its terms. So long, however, as the deed remains in the possession or subject to the control of the granter, it is open to him, in the case of a voluntary deed, to alter or cancel it, so that its mere existence is not evidence of a concluded resolution.[1] The continued possession or control of an onerous deed by the granter may prevent the completion by the grantee of a right good against third parties. In order, in the one case, that proof of the granter's intention may be complete, and, in the other case, that the grantee's right may be perfected, the law requires the fact of delivery to be established. Delivery is always a question of fact, not of law;[2] the issue being whether the person upon whom falls the burden of proof has established facts from which delivery may be inferred.

Section 2.—Actual Transference.

Subsection (1).—*To Grantee.*

1202. Delivery may be effected by actual transference—that is, by the unconditional transference of possession of the deed from, and with

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[1] Ersk. iii. 2, 43, and 44; Bell, Convey. i. 3.

[2] *M'Aslan* v. *Glen*, 1859, 21 D. 511; *Life Association of Scotland* v. *Douglas*, 1886, 13 R. 910; *Carmichael's Exrx.* v. *Carmichael*, 1920 S.C. (H.L.) 195.

the consent of, the granter to the grantee, whereby the granter parts with the power to alter or to exercise any control over the deed. No prescribed form or ceremony need be observed, and no record or narrative of the *res gestæ* made or preserved. In the simplest form the granter himself transfers the deed to the grantee with the intention that it shall be acted upon.

1203. In disputed instances the fact of transference of possession has important consequences which, although they belong to the domain of Evidence, it is convenient to note here, as they serve to illustrate the application of the principle stated above. When a deed is found in the possession of the grantee there is a presumption that it belongs to him—that is, that it has been delivered. This presumption leads also to the conclusion that the conditions, if there were any, subject to which delivery was to take place, have been fulfilled. Nevertheless in each case the particular facts and circumstances must be looked to, the real question being whether the deed has been put beyond the control of the granter.[1] It appears to be in accordance with principle to say that where the granter admits the transference, but denies that delivery was intended, or avers that conditions were attached which have not been fulfilled, the proof of these averments should, except in a case of unusual or very special character, be limited to the writ or oath of the grantee. On the other hand, if the granter denies the fact of transference, alleging, for instance, that the grantee obtained possession by fraud, parole proof should be allowed.[2] Similar rules would obtain where, the deed being in the possession of the granter, the grantee seeks to vindicate his right by explaining or challenging the granter's possession.[3]

Subsection (2).—*To a Third Party.*

1204. Where there has been transference of the possession of a deed by the granter to a third party, the purpose for, or terms upon, which that transference took place are, like other facts, matters for proof.[4] The simplest case again, as to which no doubt can arise, is where the granter hands, or sends, the deed to the third party expressly for behoof of the grantee who himself need not be aware of the transaction; but the effect of the granter's action must be that he clearly divests himself of control over the deed. Certain initial presumptions may arise in the circumstances of a case affecting the mode or burden of proof. One's agent is as one's self; possession therefore by the agent of the granter raises no presumption of delivery, whereas possession by the agent of the grantee would do so. Possession by one who is agent for both grantee and granter would raise a like presumption, but in

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[1] Cp. *Stamfield's Crs.* v. *Scot's Crs.*, 1696, 4 Bro. Supp. 344, with *Crawford* v. *Kerr*, 1807, Mor. App. "Moveables," No. 2; and *Dowie & Co.* v. *Tennant*, 1891, 18 R. 986.

[2] *M'Aslan* v. *Glen*, 1859, 21 D. 511.

[3] *Knox* v. *Crawford*, 1862, 24 D. 1088; *Henry* v. *Miller*, 1884, 11 R. 713.

[4] *Tennent* v. *Tennent's Trs.*, 1869, 7 M. 936.

each of these sets of circumstances the decision would be arrived at as a matter of fact and not as a result of legal presumptions.[1]

1205. Similar rules apply where the deed is in the possession of a neutral person—that is, of a person not identified with either granter or grantee, subject to an initial presumption that where the obligation in the deed is for a consideration already granted, he holds for the creditor in the deed, but that where the deed is gratuitous or the consideration not yet performed he holds for the debtor.[2]

Section 3.—Equivalents of Actual Transference.

Subsection (1).—*General.*

1206. A deed may be delivered although there has not been actual transference of possession to the grantee or to someone on his behalf. Questions of implied delivery occur chiefly in relation to deeds of provision and succession. In ordinary contracts there is seldom room for dispute, except perhaps in cases where several obligants are concerned. It is not possible to attempt an enumeration of the varied circumstances under which this question may arise, but it will be found in the main that they relate either to the nature and form of the deed, to the terms in which it is framed, or to some action taken by the granter in relation to it.

Subsection (2).—*Nature and Form of Deed.*

1207. Deeds properly *mortis causa* or testamentary are, of course, ambulatory and revocable up to the last moment of life. Such deeds, if found in the repositories of the granter after death and unrevoked, are held to be delivered.[3] This rule applies also to deeds which are testamentary in character, though not so in form.[4] Similarly where the granter of a deed has reserved for himself an interest in the deed, his continued possession of the document will be attributed to his desire to secure the reserved interest, a step which is not inconsistent with the effectiveness of the bequest to the grantee.[5] The application of this rule is clear where the deed is testamentary in character, particularly if there is a reservation of the power to alter. The fact that a deed of this nature has actually been transferred will not, however, make it irrevocable if nothing more than a *spes successionis* is conferred on the grantee.

1208. The extension of the rule as to testamentary deeds to deeds in favour of the granter's wife or children is commonly explained on the ground that the husband, or father, is the natural custodian of his wife's, or children's, papers. This, however, is not a satisfactory, or

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[1] *Ramsay* v. *Maule*, 1828, 6 S. 343; 1830, 4 W. & S. 58; *Maiklem* v. *M'Gruther*, 1842, 4 D. 1182; *Mair & Sons* v. *Thom's Trs.*, 1850, 12 D. 748; *Dowie & Co.* v. *Tennant*, 1891, 18 R. 986.

[2] Ersk. iii. 2, 43.

[3] Ersk. iii. 2, 44; M'Laren on Wills and Succession, i. s. 752.

[4] *Walker's Exr.* v. *Walker*, 1878, 5 R. 965.

[5] Ersk., *ut supra.*

safe, theory upon which to found delivery: the better ground is that deeds of this nature being, even if *inter vivos* in form, revocable are in truth testamentary, and accordingly to be held as delivered if found unrevoked in the granter's repositories at the time of his death. It does not appear that the reported cases go beyond this.[1]

1209. Similar considerations apply to deeds which the granter is under an antecedent obligation to execute. As the creditor could demand that his debtor should execute the deed in his favour, so also he is in a position to compel the granter to exhibit it after it has been signed. As between debtor and creditor, accordingly, the transference of the deed is not essential to its validity. So also in relation to mutual contracts signed by two or more parties for their different interests, because the moment such a deed is signed it becomes a common right to all the parties contracting. While minutes, or deeds, of discharge or transference endorsed upon the deeds to which they relate are so far evidence of intention, it is thought that the retention by the granter is, or may be, so significant as to require evidence to shew that it was not inconsistent with completed intention.

Subsection (3).—*Terms of the Deed.*

1210. The terms of a deed may lead also to the same result as, for example, deeds containing a reservation of a power of disposal, of alteration or of revocation, and also deeds bearing to be made in exercise of a reserved power. The terms of these and similar deeds, and the circumstances of their execution and preservation, are relevant to infer delivery despite the fact that there has not been actual transference. Deeds which contain a clause dispensing with delivery "are of the nature of revocable deeds; for the granter by continuing them in his own keeping continues a power in himself to cancel them; but if he do not exercise that power they become effectual on his death. Death is, in such cases, equivalent to delivery, because after it there can be no revocation."[2] Prior to the Titles to Land (Consolidation) Act,[3] the insertion of a clause expressly dispensing with delivery was important in a settlement of heritable estate.[4] Now it is merely the expression of what the law implies in a deed testamentary in character. If, on the other hand, the deed is of such a character that actual transference, or something equivalent thereto, is required by law for its efficacy, the insertion of such a clause will not compensate for failure to comply with that requirement. The case of *Walker's Exr.* v. *Walker*[5] affords an example of the application of these rules to one and the same deed according to the circumstances during the granter's life and after his death.

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[1] See *Gilpin* v. *Martin*, 1869, 7 M. 807.
[2] Ersk. iii. 2, 44.
[3] 31 & 32 Vict. c. 101.
[4] *Anderson* v. *Robertson*, 1867, 5 M. 503.
[5] 1878, 5 R. 965.

SUBSECTION (4).—*Actings in Relation to the Deed.*

1211. Probably the most unequivocal evidence of completed intention, other than that provided by actual transference, is to be found in action taken by the granter in relation to a deed which has not been in fact transferred to the granter. Thus intimation by the granter, with consent of the grantee, of an assignation is equivalent to delivery, although the deed itself remains in the granter's possession.[1] Similarly, the institution by the granter of a process of law in name of the grantee, for the purpose of enforcing or protecting a right secured by the deed, is such an unequivocal act that delivery of the deed is necessarily to be inferred.[2]

1212. The result to be attributed to the insertion of a deed in a public register has been the subject of much discussion and considerable confusion. Erskine lays down the rule [3] that the insertion of a deed in a public register, being publication to the whole people of the kingdom, is evidence that the granter intends the deed to have full effect. Even in relation to the Books of Council and Session, to which Erskine in the passage referred to was obviously referring, it is thought that the dictum is too wide. While the publication referred to may raise a presumption that delivery was intended, since the act places the deed, physically at any rate, beyond the control of the granter, and in the *quasi* possession of the grantee, still the registration may well be explained by, and attributable to, a desire to secure the preservation of the deed for reasons not inconsistent with its revocability. The question would depend for its solution, it is thought, on a consideration of all the circumstances, including the nature and terms of the deed itself.

1213. So far as registration of a deed in the Register of Sasines is concerned, a clear distinction falls to be observed between registration involving delivery of the lands and registration which may be founded on as inferring delivery of the deed conferring the beneficial right in the heritable estate dealt with in the deed. So far as the first of these is concerned there can rarely be any difficulty. If the grantee is not the same individual as the granter, recording the deed on a warrant of registration in favour of the former is equivalent to infeftment and operates a transfer of the lands themselves. If, however, the grantee is the same individual as the granter with a qualification of his title, recording the deed does not infeft the persons who are the beneficiaries of the deed, nor does it involve *per se* delivery of the deed to them. In such a case, as also in the case of the grantee being the nominee of the granter, the fact of registration is only one of the facts to be considered in determining whether the circumstances are such that the granter intended to divest himself wholly of the subjects and to transfer the

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[1] *Jarvie's Tr.* v. *Jarvie's Trs.*, 1887, 14 R. 411.
[2] *Dick* v. *Oliphant*, 1677, Mor. 6548.
[3] iii. 2, 44.

deed from his control so as to vest the beneficiaries, or someone on their behalf, with the deed and the rights flowing therefrom.[1]

Section 4.—Date of Delivery.

1214. The presumption is that a deed in the possession of the grantee, or of someone holding it for him, was delivered from the date it bears.[2] The presumption may be redargued by proper evidence. It does not arise, however, in the case of bonds of provision to children coming into competition with creditors, even where the claims of the latter are in respect of debts later in date than the date which the bond bears. In such a case the delivery of the bond must be proved to have been effected at a date anterior to the debts.[3]

Section 5.—Acceptance.

1215. There may be delivery full and complete so as to bind effectually the granter, even as has been pointed out without the grantee's knowledge, but acceptance is still in the option of the grantee.[4] Mere receipt of a deed ought not, in reason, to be construed as acceptance, but rather as an opportunity afforded by the granter to the grantee to deliberate as to the desirability of accepting. The fact of acceptance may be proved either by direct evidence of declarations or actings or as a matter of inference from facts. The cases in which the fact of acceptance is material are as a rule those in which the grantee incurs liabilities or duties by acceptance.[5]

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[1] *Cameron's Trs.* v. *Cameron*, 1907 S.C. 407, as to which see Lord Shaw's speech in *Carmichael's Exrx.* v. *Carmichael*, 1920 S.C. (H.L.) 195.

[2] Ersk. iii. 2, 43 ; *Forbes* v. *Gordon*, 1760, 2 Pat. App. 43.

[3] Stair, i. 7, 14 ; *Inglis* v. *Boswell*, 1676, Mor. 11567 ; *Simpson* v. *Finlay and Colvill*, 1697, Mor. 11570 ; *Chiesly* v. *Chiesly*, 1701, Mor. 11571.

[4] *Tennent* v. *Tennent's Trs.*, 1869, 7 M. 936, at p. 955.

[5] See *Jacobsen, Sons & Co.* v. *Underwood & Sons, Ltd.*, 1894, 21 R. 654.

DELIVERY OF HERITABLE ESTATE.

See COMPLETION OF TITLE; REGISTRATION.

DELIVERY OF MOVEABLES.

See MOVEABLES, DELIVERY OF.

DELIVERY ORDER.

See DOCUMENT OF TITLE.

DEMEMBRATION.

See CRIME.

DE MINIMIS NON CURAT PRÆTOR.

See MAXIMS.

DEMISE OF THE CROWN.

See CROWN, THE.

DEMISSION.

See CHURCH.

DE MOMENTO IN MOMENTUM.

See TIME, COMPUTATION OF.

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DENTISTS.

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Section 1.—The Dentists Acts.

1216. Although the Medical Act, 1858,[1] refers to dentistry as a separate profession, it was not until 1878 that the entrance to and control of the profession became the subjects of special legislation. These matters are now regulated by the Dentists Acts, 1878[2] and 1921.[3] The only other statutes affecting the profession as such in Scotland are the Medical Act, 1886,[4] and the Dentists Act, 1923.[5]

Section 2.—Restriction on Right to Practise Dentistry.

1217. No person, unless he is registered in the dentists register, may practise or hold himself out, whether directly or by implication, as practising or as being prepared to practise dentistry.[6] For the purposes of the Act the practice of dentistry is deemed to include the performance of any such operation and the giving of any such treatment, advice, or attendance as is usually performed or given by dentists, and any person who performs any operation or gives any treatment, advice, or attendance on or to any person as preparatory to or for the purpose of or in connection with the fitting, insertion, or fixing of artificial teeth is deemed to have practised dentistry.[7] These provisions made a great change in the law. The 1878 Act did not prohibit an unregistered person from practising dentistry, but only from assuming the title of dentist or any other name, etc., implying that he was registered or that he was specially qualified to practise.[8] The penalty for contravention of the section is a fine not exceeding £100.

1218. The section does not prevent the practice of dentistry by a registered medical practitioner, or the extraction of a tooth by a registered pharmaceutical chemist, or chemist and druggist, where the case is urgent and no registered medical practitioner or registered dentist is available, and the operation is performed without the applica-

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[1] 21 & 22 Vict. c. 90, ss. 48 and 55.
[2] 41 & 42 Vict. c. 33.
[3] 11 & 12 Geo. V. c. 21.
[4] 49 & 50 Vict. c. 48.
[5] 13 & 14 Geo. V. c. 36.
[6] 1921 Act, s. 1.
[7] *Ibid.*, s. 14 (2).
[8] *Emslie* v. *Paterson*, 1897, 24 R. (J.) 77 ; 2 Adam 323.

tion of any general or local anæsthetic, or the performance in any public dental service of minor dental work by any person under the personal supervision of a registered dentist and in accordance with conditions approved by the Scottish Board of Health after consultation with the Dental Board. Conditions have been approved by the Scottish Board of Health, after consultation with the Dental Board, for the performance of minor dental work in the school medical service of Local Education Authorities. Under these conditions the work done is limited to cleaning and polishing, applying or removing dressings or temporary fillings, charting, recording, or work of like responsibility. The person concerned must be either (*a*) a registered dental student with a certain training, or (*b*) a dental nurse who has received a course of instruction, or (*c*) a person already employed on such work; and the registered dentist under whose personal supervision the work is performed (*a*) must always be present when operative work is being carried on, (*b*) must not supervise more than two persons at once if he himself is performing operative work, or six persons if he is not, and (*c*) must prescribe the treatment to be given, and inspect every case after treatment and be responsible for the efficient carrying out of the treatment.

1219. A person registered under the Act is entitled to practise dentistry and dental surgery in any part of His Majesty's dominions,[1] subject to any local law in force in that part,[2] and is exempt, if he so desires, from serving on inquests and juries.[3] A registered dentist is entitled to the same privileges as a registered medical practitioner in connection with the purchase of poisons, that is, he need not sign the book kept by the chemist, provided an order in writing signed by him has been received by the chemist.[4]

1220. A body corporate may carry on the business of dentistry if (*a*) it carries on no business other than dentistry or some business ancillary to the business of dentistry, and (*b*) a majority of the directors and all the operating staff are registered dentists.[5] Special provision is made for companies carrying on the business of dentistry at the commencement of the Act.[5] Except as aforesaid it is illegal for a company to carry on the business of dentistry.[6] The Board has power, which it has exercised,[7] to make regulations for dental companies.

Section 3.—The Dentists Register.

1221. The dentists register was established by the 1878 Act, but it was under the control of the General Council of Medical Education and Registration of the United Kingdom (referred to in the Dentists Act as the General Council), and was kept by the Registrar of the

[1] 1878 Act, s. 5; 1921 Act, Second Schedule; Medical and Dentists Acts Amendment Act, 1927 (17 & 18 Geo. V. c. 39), s. 2 and Schedule, Part II., para. 4 (as to the Irish Free State).
[2] Medical Act, 1886 (49 & 50 Vict. c. 48), ss. 26 and 27. [3] 1878 Act, s. 30.
[4] Dangerous Drugs and Poisons (Amendment) Act, 1923 (13 & 14 Geo. V. c. 5), s. 3.
[5] 1921 Act, s. 5 (1). [6] *Ibid.*, s. 5 (2). [7] S.R. & O., 1923, No. 1615.

General Council.[1] Under the 1921 Act control of the register was to a large extent removed from the General Council and handed over to a new body, the Dental Board,[2] who appoint their own registrar. The register contains three alphabetical lists, (*a*) of United Kingdom dentists, (*b*) of colonial dentists who are registered under the Act, and (*c*) of foreign dentists who are registered under the Act.[1] The registrar must insert any alteration which comes to his knowledge in the name or address of any person registered.[3] He must erase from it the name of every deceased person.[4] He may erase the name of any person who has ceased to practise, either with that person's consent or if the person does not reply to notices sent to him.[5] The Dental Board must direct the erasure from the register of any entry which has been incorrectly or fraudulently made,[6] and it may direct the restoration of any entry the erasure of which it has directed.[7]

1222. Where a person registered in the register has been convicted of an offence which, if committed in England, would be a felony or misdemeanour, or has been guilty of infamous or disgraceful conduct in a professional respect, he is liable to have his name erased from the register. The Board may, and on the application of any medical authority (*i.e.* one of the bodies or universities who choose members of the General Council [8]) must, cause an inquiry to be made into the case of such a person, and if they are satisfied that his name ought to be erased from the register they must forward a report to the General Council setting out the facts proved and the finding of the Board. The General Council may then direct the registrar to erase the name from the register.[9] The General Council has no power to order the erasure of a name from the register except upon one or other of the grounds mentioned above.[10] The General Council has power to direct the restoration to the register of any name erased therefrom by the Council, but only on a report made to the Council by the Board.[11]

1223. The accepted definition of "infamous conduct in a professional respect," the phrase in the Medical Act, 1858,[12] was formulated in the undernoted case,[13] where it was pointed out that for an action to be of that description it must not only be infamous, but also infamous for a medical man to do.[14] "If it is shewn that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General Medical Council to say that he has been guilty of infamous conduct in a professional respect." [15] It is infamous conduct in a

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[1] 1878 Act, s. 11.
[2] 1921 Act, ss. 2 and 6 and First Schedule.
[3] 1878 Act, s. 12 (1).
[4] *Ibid.*, s. 12 (2).
[5] *Ibid.*, s. 12 (3); 1921 Act, s. 12.
[6] 1878 Act, s. 13; 1921 Act, s. 8 (1) (*a*).
[7] 1921 Act, s. 8 (2).
[8] 1878 Act, s. 2.
[9] *Ibid.*, s. 13; 1921 Act, s. 8.
[10] *Ex parte Partridge*, 1887, 19 Q.B.D. 467.
[11] 1878 Act, s. 14; 1921 Act, s. 8 (2).
[12] 21 & 22 Vict. c. 90.
[13] *Allinson* v. *General Council of Medical Education and Registration*, [1894] 1 Q.B. 750.
[14] *Allinson, supra*, at p. 761.
[15] *Ibid.*, at p. 763.

professional respect to defame brother practitioners so as to induce patients to avoid going to them and to come to the man making the defamatory statements,[1] or to cover so as to enable an unqualified person to practise as if duly qualified.[2] In the Dentists Act, 1878, the words are "infamous or disgraceful conduct," but this probably does not extend the meaning, as in the definition given above the word "disgraceful" is equated with "infamous." It has been held to be "professional misconduct," the phrase used in a partnership deed, for a dentist to advertise that his instruments were sterilised before use and that a trained lady nurse was always present at dental operations so as to prevent scandal, the innuendo being that most other practitioners did not sterilise their instruments and that it was not uncommon for dentists to take advantage of their lady patients.[3]

1224. A right of appeal is given to any person aggrieved by the removal of his name from the register or by any refusal or failure to register his name.[4] Upon the assumption that "removal" means "erasure" this renders an appeal competent in the following cases: (*a*) where the General Council has directed the erasure of a name; (*b*) where the registrar has erased the name of a person on the ground that he has ceased to practise; and (*c*) where the Dental Board has caused an entry to be erased on the ground that it has been incorrectly or fraudulently made; and also (*d*) where the registrar or Dental Board refuses or fails to register the name of a person who claims to be entitled to registration. The appeal is to the High Court (in Scotland to the Court of Session) in manner provided by Rules of Court. No Act of Sederunt has been passed to regulate the procedure in these appeals. Where there has been a refusal or failure to register, an application to the Court by petition under section 91 of the Court of Session (Scotland) Act, 1868,[5] would seem to be a suitable form,[6] and in the case of the removal of a name, an interdict or declarator and interdict. There is no limitation as to the grounds of appeal, and the Appeal Court is apparently bound to investigate the facts. The real effect of the allowance of appeal seems to be that an inquiry into the whole facts in a new process is now allowed, whereas previously the Court had no power to review the decision of the General Council provided that there was evidence sufficient to support the decision,[1] that the Council acted regularly and in accordance with the Act,[7] and that the charge was one in which the Council had jurisdiction.[2]

1225. The Dental Board has power to make regulations with respect to the form and keeping of the register, with respect to proceedings before the Board in connection with the removal from or restoration

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[1] *Allinson* v. *General Council of Medical Education and Registration*, [1894] 1 Q.B. 750.
[2] *Leeson* v. *General Council of Medical Education and Registration*, 1889, 43 Ch. D. 366.
[3] *Clifford* v. *Timms*, [1908] A.C. 12.
[4] 1921 Act, s. 9.
[5] 31 & 32 Vict. c. 100.
[6] *Sons of Temperance Friendly Society*, 1926 S.C. 418.
[7] *Allbutt* v. *General Council of Medical Education and Registration*, 1889, 23 Q.B.D. 400.

to the register of any name, and with respect to the annual fee to be charged for the retention of a name on the list.[1] Various regulations have been made.[2]

1226. The following persons are entitled to be registered: graduates or licentiates in dental surgery or dentistry of any of the medical authorities and certain foreign and colonial dentists.[3] The medical authorities are the bodies and universities who choose members of the General Council;[4] they are set out in s. 7 of the Medical Act, 1886.[5] Colonial and foreign dentists are entitled to registration if they hold a certificate, degree, etc., recognised by the General Council as furnishing evidence of sufficient knowledge and skill.[6] A foreign or colonial dentist refused admission to the register has a right of appeal to the Privy Council in certain circumstances.[7] There are statutory provisions of a temporary nature regarding the admission of certain special classes of person to the register,[8] but these appear now to be of little importance.

Section 4.—Liability of Dentists.

1227. In his treatment of a patient a dentist is bound to exhibit the ordinary skill and care of his profession.[9] In case of failure in this duty he is liable to the patient[10] for any injury resulting from such failure. If a person who is not a registered dentist undertakes a dental operation (thus committing an offence under the 1921 Act), he must, if he is not known to the patient to be unregistered, attain the standard of skill of a registered practitioner at the place and in the circumstances where the services are rendered; if known to be unregistered, then only the skill which he professes.[9] If a dentist by a mistake due to carelessness cause the death of a patient, he is probably guilty of culpable homicide unless he can point to some circumstance which will excuse him.[11] So also if the death be due to criminal inattention.[12]

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[1] 1921 Act, s. 7; *Tattersall* v. *Sladen*, 1928, 44 T.L.R. 237.
[2] S.R. & O., 1923, Nos. 1615, 1616, and 1617; S.R. & O., 1925, No. 649; S.R. & O., 1926, No. 799.
[3] 1878 Act, s. 6; 1921 Act, s. 11 (1); Medical and Dentists Acts Amendment Act, 1927 (17 & 18 Geo. V. c. 39), s. 2 and Schedule, Part II., para. 5.
[4] 1878 Act, s. 2.
[5] 49 & 50 Vict. c. 48.
[6] 1878 Act, ss. 8, 9, and 10.
[7] *Ibid.*, s. 10.
[8] *Ibid.*, s. 6; 1921 Act, s. 3; Dentists Act, 1923 (13 & 14 Geo. V. c. 36), s. 1.
[9] *Dickson* v. *Hygienic Institute*, 1910 S.C. 352.
[10] *Edgar* v. *Lamont*, 1914 S.C. 277.
[11] *H.M. Advocate* v. *Wood*, 1903, 4 Adam 150; *H.M. Advocate* v. *Armitage*, 1885, 5 Couper 675.
[12] *R.* v. *Long*, 1830, 4 C. & P. 398.

DENUNCIATION.

See CRIME (PROCEDURE); DILIGENCE OF CREDITORS; IMPRISONMENT FOR DEBT.

DEPOSITATION OR DEPOSIT.

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Section 1.—Nature of the Contract.

Subsection (1).—*In the Roman Law.*

1228. *Depositum* in Roman Law was a contract by which the owner of a moveable (*Depositor*) placed it in the charge of another (*Depositarius*) to keep it gratuitously and restore it on demand. In contracts of deposit both parties were bound to do all that was required by *bona fides*. The depositary was not entitled to make any use of the deposit, and would have been guilty of *furtum* had he done so.[1] As the depositary derived no benefit from the transaction he was only liable for *dolus* or *culpa lata* unless he had come under a special undertaking for safe custody, in which case he was liable for ordinary neglect.[2] When the depositary had been guilty of carelessness and allowed the deposit to be stolen he was not liable, in the absence of specific stipulation, as the depositor had only himself to blame for selecting such a negligent person as his depositary.[3] The contract being for the benefit of the depositor, he was bound to exercise *omnis diligentia* that the deposit should cause no damage,[4] and he had to pay all expenses incident to the custody of the thing deposited, including the cost of carriage to and from the place of deposit.[5] The article deposited could not be retained by the depositary as a set-off for any debt or claim due to him by the depositor,[6] but probably there was an exception in respect of expenses incurred in connection with the thing itself. The depositor had the *actio depositi directa* for the restoration of the thing deposited, while the depositary had the *actio depositi contraria* for indemnification of any loss he might have incurred through the custody of the deposit. Where the depositor had been compelled by force of circumstances, such as fire or shipwreck, to make a deposit, known as a *depositum miserabile*,

[1] Just. Inst. iv. 1. 6. [2] Dig. xiii. 6. 5. 2. [3] Just. Inst. iii. 14. 3.
[4] Dig. xiii. 7. 31. [5] Dig. xvi. 3. 12.
[6] Paulus Sententiarum, ii. 12. 12. Codex Justiniani, iv. 34. 11.

he was entitled to recover twice the value thereof from a fraudulent depositary provided he sued the depositary in person. He could not receive double damages from the depositary's heir, except on the ground of the latter's personal fraud.[1]

Subsection (2).—*In the Law of Scotland.*

1229. In the Law of Scotland deposit is essentially gratuitous, for where a consideration is given the transaction becomes one of Hiring of Care and Custody.[2] In modern practice, however, there is frequently found a form of deposit which, though not depending on any direct consideration, is nevertheless only gratuitous by reason of some other contractual relationship between the depositor and the depositary. So where a customer hands over valuables to his banker for safe custody, it is clear that the banker only receives them for gratuitous deposit in view of the fact that the depositor is one of his customers. "There has grown up a practice of customers sending their jewels and securities to bankers to be taken care of. But the banker discriminates between customers and those who have no relation with his bank. If the latter were to wish to place securities with him, he would either refuse or make a charge. The relations of his customer with him make a difference in this respect, that he acts differently in the customer's case from what he would if the relation of customer did not exist. Then can it fairly be said that the position of a banker taking charge of securities for a customer is identical with that of a man entrusting his gold watch to a friend or locking up his deed-box in a neighbour's house while he goes "out of town?"[3] In such a case the bankers might make a charge "if they were not otherwise remunerated for their trouble."[4] Similar features are found where hotel proprietors accept custody of valuables deposited by their guests, but in this case the Innkeepers' Liability Act,[5] 1863, would probably apply, and liability be assessed thereunder.

Section 2.—Proper and Improper Deposit.

1230. Deposit is either Proper or Improper. In Proper Deposit a specific subject is entrusted to the depositary to be restored unimpaired, without alteration and with all its increases and profits. The possession and the property are effectually separated, the real right remaining in the depositor; the depositary's creditors have no claim on the subject, and if the depositary fraudulently sell the deposit, the owner can probably demand restitution from the purchaser.[6] There may also be proper deposit of fungibles and money, but they must be delivered as

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[1] Just. Inst. iv. 6. 17. Dig. xvi. 3. 1. 2, 3, 4.

[2] See *Central Motors (Glasgow), Ltd.* v. *Cessnock Garage and Motor Co.*, 1925 S.C. 796, per Lord Pres. Clyde at pp. 800, 801.

[3] Beven on Negligence, 3rd ed., p. 1330.

[4] *Brandao* v. *Barnett*, 1846, 12 Cl. & Fin. 787, at p. 809.

[5] 26 & 27 Vict. c. 41.

[6] Bell, Com. i. 277.

specific subjects and kept distinct and capable of identification.[1] Bills, too, and notes may be properly deposited; but, if negotiable, their negotiation by the depositary must be rendered impossible.[2]

1231. In Improper Deposit, fungibles, such as money, are deposited to be returned in kind. In this case the real right passes as well as the possession, and the depositor can claim merely as a creditor on the depositary's estate.[3] Where deposited goods are extant and distinguishable the depositor in all cases of Proper Deposit is entitled to have them set apart from the common fund, and delivered up to him. Where the subject deposited is not to be itself returned but only in kind, the depositor is only a personal creditor.[4]

Section 3.—Completion of the Contract.

1232. The contract is completed by delivery actual or constructive. A mere promise to deliver or receive is not sufficient, but any clear manifestation of intention to take charge of a thing which is incapable of manual delivery, but which is at the disposal or in the control of the promisor, will constitute deposit.[5] When the deposit is received by a person other than the depositary himself "it must clearly appear that the delivery is not on his own account but is on account of the party who is charged as bailee." [6] Where a servant acting in the scope of his employment accepts a deposit on behalf of his master, this will constitute delivery. It is not clear whether the master's prior agreement to act as a depositary is necessary, or whether he would in any event be bound by the actings of his servant. A distinction must be drawn between the case where the acceptance of goods by a servant on behalf of his master is clearly or may reasonably be considered an act within the scope of his employment, and the case where the goods are of such a nature or the circumstances so unusual that the acceptance of the goods could not be held to be within the scope of the servant's employment. In the former case the master would be bound by the actings of his servant, but in the latter it is thought that he would not be bound.[7]

Section 4.—Involuntary Depositary.

1233. It has been stated that it is impossible for a man to become a depositary without his knowledge or consent.[8] There are two well-known cases which bear out this rule, but the results arrived at are not entirely satisfactory. In *Lethbridge* v. *Phillips* [9] a picture was sent to the house of the defendant without the latter's knowledge, and

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[1] Bell, Com. i. 277; *Howard* v. *Jemmet*, 1763, 3 Burr. 1368, at p. 1369 (note).
[2] Bell, Com. i. 278.
[3] Bell's Prin., s. 211; Com. i. 277.
[4] Bell, Com. i. 278; and see Bell's Prin., s. 211.
[5] Addison, Law of Contracts, 11th ed., p. 844; Story, Bailments, s. 55.
[6] Story, *ibid.*
[7] Addison, Law of Contracts, *supra*.
[8] Story, *supra*, s. 59.
[9] 1819, 2 Stark. 544.

without any previous communication, and was damaged while there; it was held that the defendant could not be considered a bailee, as the picture had been sent to his house without his knowledge or consent. It is not clear from the report whether the defendant ever actually knew that the picture was in his house. On the supposition that he did, it is difficult to see how he was not as responsible for its custody as he would have been for that of something which he had found and of which he had taken possession. This point is more forcibly raised in the second case,[1] where a manuscript play was sent unsolicited to a theatrical manager in whose possession it was lost. It was there held that "there was no case to go to the jury, for the plaintiff had chosen voluntarily to send to the defendant what the defendant had never asked for, and no duty of any sort or kind was cast upon the defendant with regard to what was so sent." It is difficult to reconcile the above statement with the ordinary rules of law regarding the general duty to refrain from wilfully injuring the property of another. But apart from the question of intentional hurt, it is not easy to see how a person who has knowingly, although not willingly, got in his possession the property of another is exempt from taking even the smallest degree of care to prevent it coming to harm. Mr Beven points out that the defendant might have avoided liability by refusal to accept, by absolutely ignoring the thing sent, or by immediately returning it, and suggests that in the event of his acquiescing in the receipt, he could not be regarded as in any better position than a finder of the play, who has his choice to pass it by or take it up; in which latter case he would be required to answer for gross negligence.[2] An obvious exception to such a rule as laid down would be where the recipient had no possible opportunity of accepting or rejecting what was offered.[3]

1234. A further aspect of the subject remains to be considered where goods ostensibly for the addressee are left at his house under circumstances which give rise to reasonable doubt in his mind as to whether the goods are really intended for him or not. In an old case [4] it was held that the defender was liable where an ox had been delivered to his house by the pursuer's servant, who had forgotten the name of the proper recipient, and he had consumed it on the supposition that it was a present from someone. It is not clear from the report on what grounds the judgment proceeded, but the principal contention for the pursuer was that the defender was not entitled to be enriched at the expense of another. This decision may be explained on the ground that the gift of an ox without any previous warning or notification is an unusual occurrence, and the recipient might have reasonably been

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[1] *Howard* v. *Harris*, 1884, 1 Cab. & El. 253, per Williams J. at p. 254.

[2] Beven, Negligence in Law, 3rd ed., p 753; but see Chitty on Contract, 17th ed., p. 491, and Addison, Law of Contracts, 11th ed., p. 844.

[3] *Taylor* v. *Laird*, 1856, 25 L.J. Ex. 329, per Pollock C.B. at p. 332.

[4] *Findlay* v. *Monro*, 1698, Mor. 1767.

expected to make inquiries before using the goods. It would appear that in this case the defender became an involuntary depositary and was accordingly liable for the value of the ox, when he was unable to return it, and could not shew that he had taken reasonable care of it. As he had consumed it, he was also liable *in quantum lucratus*. It is thought that this rule is not always applicable, and that each case must be decided in the light of its own particular circumstances. Thus where A. receives by post a salmon which is addressed to him, but bears no mark of origin, is he entitled to assume that it is a gift from an unknown benefactor or may he by receiving it into his house become the depositary for the sender? This case is distinguishable from that of the ox in that the salmon was actually addressed to the recipient, thus raising a strong presumption that it was intended for him. The gift of a salmon, moreover, is not an uncommon occurrence, and it is thought that in such a case the recipient would be entitled to act upon the presumption.

1235. Where the thing sent in the circumstances just figured is not perishable, but is capable of being used, is the recipient entitled to use it, or must he treat it as subject to the strict rules of deposit? Direct authority on the subject is entirely lacking, and it is thought that each case will fall to be decided on its own particular circumstances, the following factors being taken into consideration: whether it was reasonably probable that the thing sent should be a gift, and whether the recipient could reasonably have traced the origin of the article.

1236. There is, lastly, a class of depositary who is strictly a voluntary depositary, but is included here in view of the fact that he probably unwittingly constitutes himself a depositary by his own act. He who finds goods which he knows belong to another, and takes possession of them, becomes a depositary and is liable to exercise reasonable diligence in looking after them.[1] There is no necessity for the finder to take possession of the goods, and if he does so he voluntarily assumes the status of depositary though he probably does not himself realise it. Where, for example, a tree belonging to A. is blown down and falls on B.'s land, B. will be held to have taken it into his possession if he does anything in connection with it, and he will thereafter be obliged to exercise ordinary diligence towards it, but if he does not intermeddle with it he will not be in any way responsible to its owner.[2] This principle is in accordance with the view of Mr Beven [3] when he maintains that the recipient would come under no obligation if he "absolutely ignored" the thing sent, but it would appear to be opposed to that laid down in *Howard* v. *Harris*.[4]

Section 5.—Duties of the Depositor.

1237. The depositor is liable to reimburse the depositary for any necessary loss or expense the latter may have suffered in connection

[1] Beal, Law of Bailments, p. 69, and authorities there cited.
[2] Wyatt Paine, Bailments, p. 24. [3] *Cit.* para. 1233, *supra*. [4] 1884, 1 Cab. & El. 253.

with the deposit,[1] and he is also under an obligation to receive back the deposit. In the selection of a depositary the depositor must use his discretion, for if "the bailee is an idle, careless, drunken fellow and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen and his own, yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow."[2] The application of this statement is explained in *The William*,[3] where it is stated that where the depositor knows the character of the depositary the care the latter takes of his own goods might be a reasonable criterion.

Section 6.—Duties of the Depositary.

1238. The contract being gratuitous the depositary is liable only for what was called gross negligence, which has been described as "a great and aggravated degree of negligence,"[4] and as consisting in the "omission of that care, which even inattentive and thoughtless men never fail to take of their own property."[5] He is not liable for slight neglect or ordinary accidents. There has, however, been a tendency to drop the term "gross negligence," "which is only negligence with a vituperative epithet."[6] It is almost impossible to draw a hard and fast line between "that care which a man of ordinary prudence would display in the management of his own affairs and that high degree of negligence which is termed *culpa lata*."[7] If the subject perishes without fault it perishes to the owner.

1239. What amounts to negligence is a question of circumstances in each case. There are, however, various general principles which may be considered in dealing with a particular case. Thus, the care which the depositary has to exercise is such as men of ordinary prudence might be expected to exercise in regard to subjects of a similar description. The precise degree of diligence exigible can only be determined by consideration of the nature and value of the deposit. It is not a good answer to a charge of neglect that the depositary kept the deposit as he kept his own goods, and that the latter were lost along with it,[8] for the test of diligence is not what a partciular man does but what the average man may be expected to do in given circumstances—that is to say, he must employ "that ordinary diligence which men of common prudence generally exercise about their own affairs."[9]

1240. Questions have frequently been raised as to whether there is

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[1] Stair, i. 13, 9.
[2] *Coggs* v. *Bernard*, 1701, 1 Smith's L.C., 12th ed., p. 191, at p. 199.
[3] 1806, 6 Rob. Ad. 316; see also Kent, Com., 13th ed., pp. 2, 562, note (*a*).
[4] *Doorman* v. *Jenkins*, 1834, 2 A. & E. 256, at p. 262.
[5] Jones, Essay on the Law of Bailments, p. 21.
[6] *Wilson* v. *Brett*, 1843, 11 M. & W. 113, per Rolfe B. at pp. 115, 116.
[7] *Raes* v. *Meek*, 1889, 16 R. (H.L.) 31, per Lord Herschell at p. 35; see also Glegg on Reparation, 2nd ed., pp. 12, 13.
[8] *Doorman* v. *Jenkins*, *supra*, at p. 261; Bell's Prin., s. 212.
[9] *Giblin* v. *M'Mullen*, 1868, L.R. 2 P.C. 317; *Troke* v. *Felton*, 1897, 13 T.L.R. 252.

a distinction in the degree of care to be shewn by an ordinary depositary and one who has undertaken to look after the deposit to the best of his skill. In *Shiells* v. *Blackburne* [1] Lord Loughborough says: "I agree with Sir William Jones [2] that where a bailee undertakes to perform a gratuitous act for which the bailor alone is to receive benefit, then the bailee is liable only for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or impression is such as to imply skill, the omission of that skill is imputable to him as gross negligence." It will thus be seen that what is actionable negligence on the part of A. is not necessarily such on the part of B., and accordingly it must always be a question of circumstances whether the depositary is guilty of negligence sufficient to cause liability. In *Coggs* v. *Bernard* [3] Holt C.J. expresses the view that gross negligence is practically the same as dishonesty.

1241. It is, further, clear that the depositary must not place the thing deposited in a dangerous place, but if through the failure of duty on the part of a third party the deposit is damaged the depositary may proceed against the third party.[4] If the deposit be a locked or closed box, with the contents of which the depositary is not acquainted, and of which he has not got the key, he is liable only for the box and not for the contents,[5] provided he take that care of the box which its general appearance seems to require.[6] But if to his knowledge the contents are of special value he will be responsible for exposing the box to risk or treatment inappropriate to the nature of its contents. It was thought at one time [7] that the depositary would be liable if the deposit was stolen from him, unless he had specially stipulated that he would only keep the goods as he kept his own, but this view had been directly negatived in *Coggs* v. *Bernard*,[8] where it was laid down that liability on the part of the depositary could only arise from negligence.

1242. As has been noted above, it is not always easy to say whether a banker who receives articles of value from one of his clients for safe custody is really a gratuitous depositary, liable only for a high degree of negligence, or whether he is actually a depositary for reward and as such liable for ordinary negligence. In *In re United Service Company* (*Johnston's Claim*),[9] the circumstances were such that the bankers were held to have become bailees in the ordinary course of their business, and to have acquired a lien for their general banking account, and accordingly were bailees for reward and liable for ordinary negligence. On the other hand, where the bankers accept the deposit as

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[1] 1789, 1 H. Bl. 158, at p. 162.
[2] Essay on the Law of Bailments, p. 46.
[3] 1701, 1 Smith's L.C., 12th ed., p. 191, at p. 199.
[4] *Rooth* v. *Wilson*, 1817, 1 Barn. & Ald. 59.
[5] Ersk. Inst. iii. 1, 26; *Earl of Cassils* v. *Simpson*, 1626, Mor. 3452.
[6] Addison, Law of Contracts, 11th ed., p. 845.
[7] *Southcote's Case* (*Southcote* v. *Bennet*), 1601, Co. Rep. Pt. 4 (83*b*), p. 487.
[8] *Supra*; Story, Bailments, s. 72, [9] 1871, L.R. 6 Ch. 212.

a courtesy or accommodation to their clients and not as a part of their regular business it will be a gratuitous deposit, and the bank will only be liable for an aggravated form of negligence.[1] If they are stolen by a clerk or servant employed about the bank, the bankers will not be responsible, unless they have knowingly hired or kept in their service a dishonest servant.[2] Where the deposit is stolen by or lost through the negligence of the depositary's servant, the depositary is not liable.[3]

Section 7.—Use of the Deposit by the Depositary.

1243. In proper deposit the depositary has no right to make use of the deposit without permission, express or implied, and if he does so he will be liable for any resulting damage or deterioration. Permission to use is sometimes implied from the nature of the subjects, as in the case of sporting dogs or horses. The best general rule on the subject is, according to Story,[4] to consider whether there may or may not be an implied consent, on the part of the owner, to the use; if the use would be for the benefit of the deposit, the assent of the owner may well be presumed; if to his injury, or perilous, it ought not to be presumed; and if the use would be indifferent, and other circumstances do not incline either way, the use may be deemed not allowable. Where the gratuitous use of the thing is offered to the depositary the contract is strictly one of Commodate or Loan and the borrower is bound to the strictest care and diligence.

1244. Clearly the depositary is not allowed to sell the article deposited, nor can he give it in pledge. And where the depositor interferes with the deposit he is bound to restore it to that state of security in which it originally was.[5]

Section 8.—Return of the Deposit.

Subsection (1).—*Refusal to Return.*

1245. Restoration cannot be refused by the depositary on the ground that he believes the article is truly the property of another than the depositor,[6] and if a third party claims the deposit, the depositary ought to retain custody of it until the question of right is decided,[7] raising, if necessary, an action of multiplepoinding to relieve himself of the deposit. The depositary can never have a better title than the depositor, and accordingly eviction by the true owner would be a good defence.[8]

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[1] *Giblin* v. *M'Mullen*, 1868, L.R. 2 P.C. 317.
[2] Addison, Law of Contracts, 11th ed., p. 846.
[3] *Ibid.*, and cases there cited.
[4] Bailments, s. 90.
[5] *Vide Nelson* v. *Macintosh*, 1816, 1 Stark. 237, which, it should be noted, is a case of Mandate.
[6] *Gelot* v. *Stewart*, 1871, 9 M. 957.
[7] Ersk. Inst. iii. 1, 27; *Biddle* v. *Bond*, 1865, 6 B. & S. 225.
[8] Addison, Law of Contracts, 11th ed., p. 848.

Should the depositary wrongfully refuse to return the article, he will thenceforward hold it at his peril, that is to say, he will be liable for all injuries that may afterwards happen to it, "unless it shall appear that the deposit would have perished, or have had the same chance of perishing though it had been redelivered to the owner when he called for it." [1]

1246. There can be no action at the instance of the depositor for the return of the deposit until he has first made a demand on the depositary to restore the subject.[2] The quinquennial limitation does not apply.[3] Joint depositaries are liable *in solidum* for the restoration of the deposit.[4] But where there are several depositors the depositary is not bound to restore the deposit on the demand of one of them.[5]

Subsection (2).—*The Depositary's Right of Retention.*

1247. In England no right of lien is admitted upon the deposit, and the depositary cannot hold it for the expenses he has incurred in keeping it and preserving it; [6] so where a dog strayed into the defendant's house and was looked after there for twelve months, it was held that he could not retain the dog until he had been paid the expenses of its keep.[7] In Scotland, however, the rule is different, and a depositary is entitled to reimbursement and recompense for any necessary expense or loss occasioned by the contract, and for expenses incurred in connection with the subject deposited; [8] he may retain the deposit until he is fully indemnified.[9] There is, however, no right of retention where the debt has no relation to the subject deposited.[10] Thus bankers have no general lien for previous and subsequent debts over valuables or scrip contained in locked boxes and deposited with them gratuitously and merely for safe custody,[11] nor would it appear that there would be a lien even if the scrip were periodically removed from the box for the collection of interest.[12] The presumption is in favour of the banker's lien, but it can be rebutted by the depositor proving that the scrip was lodged for a specific purpose, which must be clearly ascertained, or that it was manifestly lodged only for safe custody.[13]

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[1] Ersk. Inst. iii. 1, 26.

[2] *In re Tidd*, [1893] 3 Ch. 154; Pothier, Law of Obligations, ii. 126.

[3] *Taylor* v. *Nisbet*, 1901, 4 F. 79.

[4] Bell's Prin., s. 212; Ersk. Inst. iii. 1, 26; *cf. Earl of Dundonald* v. *Masterman*, 1869, L.R. 7 Eq. 504.

[5] *Atwood* v. *Ernest*, 1853, 22 L.J. C.P. 225; Addison, Law of Contracts, 11th ed., p. 848.

[6] Addison, Law of Contracts, 11th ed., p. 850.

[7] *Binstead* v. *Buck*, 1776, 2 Bl. W. 1117; Wyatt Paine on Bailments, p. 25.

[8] Stair, i. 13, 9.

[9] Ersk. Inst. iii. 1, 27; *Earl of Bedford* v. *Lord Balmerino*, 1662, Mor. 9135; and see Gloag on Contract, p. 747.

[10] Ersk. Inst. iii. 1, 27; *Scot* v. *Scot*, 1697, Mor. 2628; *Crs. of Stuart* v. *Stuart*, 1709, Mor. 2629; *Mackenzie* v. *Newall*, 1824, 3 S. (N.E.) 144; *M'Gregor* v. *Alley and M'Lellan*, 1887, 14 R. 535.

[11] *Leese* v. *Martin*, 1873, L.R. 17 Eq. 224.

[12] *Brandao* v. *Barnett*, 1846, 12 Cl. & Fin. 787.

[13] *Robertson's Tr.* v. *Royal Bank of Scotland*, 1890, 18 R. 12; see also "Banker's Lien," *supra*, Vol. II. para. 146.

SECTION 9.—ONUS OF PROOF.

1248. Where the deposit has been lost or injured while in the custody of the depositary, he must shew that the loss or injury resulted from no lack of care on his part, but he need not shew that he is unable to account for the manner in which the deposit was lost or injured.[1] And where there is a controversy as to whether the deposit has been returned or not, and the depositor is able to prove deposit (which can be competently proved *prout de jure*), the onus is then on the depositary to prove restoration.[2]

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[1] *Bullen* v. *The Swan Electric Engraving Co.*, 1907, 23 T.L.R. 258; *Copland* v. *Brogan*, 1916 S.C. 277; but see also *Wiehe* v. *Dennis Bros.*, 1913, 29 T.L.R. 250.
[2] *Taylor* v. *Nisbet*, 1901, 4 F. 79.

DEPOSIT RECEIPT.

See BANKING; DONATION.

DEPOSITION OF A CLERGYMAN.

See CHURCH.

DERELICT.

See PROPERTY; SHIP.

DERELICTION OF VALUATION OF TEINDS.

See TEINDS.

DESCENDANTS.

See SUCCESSION.

DESERTION (CONJUGAL).

See DIVORCE; HUSBAND AND WIFE.

DESERTION OF DIET.

See CRIME (PROCEDURE).

DESERTION OF INFANTS.

See CHILDREN AND YOUNG PERSONS; CRIME.

DESERTION (MILITARY, NAVAL, MERCANTILE MARINE).

See ARMED FORCES OF THE CROWN; SEAMEN.

DESERTION OF SERVICE.

See MASTER AND SERVANT.

DESERTION BY TENANT.

See AGRICULTURAL HOLDINGS ACT; HYPOTHEC; LEASE; REMOVING.

DESIGNATION OF LANDS.

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DESIGNS.

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Section 1.—Meaning.

1249. The law as to designs is governed by the Patents and Designs Act, 1907,[1] as amended [2] by the Patents and Designs Act, 1919.[3] The 1919 Act (s. 19) defines a "design" as follows:—

"Design" means "only the features of shape, configuration, pattern, or ornament applied to any article by any industrial process or means, whether manual, mechanical, or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction, or anything which is in substance a mere mechanical device."

"Article" here "means any article of manufacture and any substance artificial or natural, or partly artificial and partly natural." [4] This does not make any attempt to define the word "design" in any way apart from its ordinary meaning. It has been held by the House of Lords that the object of the similar section in the 1883 Act was to make the word "design" "as extensive as it reasonably ought to be." It was not intended to draw a hard-and-fast distinction between designs as being applicable either for the "pattern" or for the "shape or configuration" or for the "ornament." The object was to shew that the word "design"

General Authorities.—Moulton and Jackson, The Patents, Designs, and Trade Marks Acts (1920); Romer, Patents and Designs and Practice, 2nd ed., 1926; Edmunds and Bentwich on Designs, 2nd ed., 1908.

[1] The Act of 1919 frequently substitutes new sections for the original sections of the Act of 1907; *e.g.* the text of s. 24 of the latter Act will now be found by reference to the Act of 1919.

[2] 7 Edw. VII. c. 29 (here referred to as "1907 Act," or "the Act").

[3] 9 & 10 Geo. V. c. 80 (here referred to as the "1919 Act"). For the earlier history of the subject see Edmunds and Bentwich on Designs, 2nd ed., 1908.

[4] 1907 Act, s. 93.

in the Act was not intended to be used in any technical sense as excluding anything that would ordinarily fall within it.[1]

1250. The design need not have artistic merit; constructive merit is sufficient;[2] but it must be something appealing to the eye, and to the eye alone, apart from the object to which it is to be applied.[3] It may be for something which has also been patented or registered as a trade mark,[4] but it must not be a process or mode of manufacture, *e.g.* a pattern of osier basket consisting in the osiers being worked in a particular way,[5] or a mode of shaping gores or gussets so as to produce a straight-fronted corset.[6] It may be applicable only to part of a complete article.[7]

Section 2.—Registration.

1251. Any person, including a firm, partnership or body corporate claiming to be the proprietor of any new or original design, not previously published in the United Kingdom, may apply to the Comptroller-General of Patents, Designs, and Trade Marks to have the design registered in the Register of Designs kept at the Patent Office.[8] The applicant must state the articles to which the design is to be applied, and the class of goods in which he desires it to be registered; and the same design may be registered in more than one class, separate application being made in each class.[9] S. 50 appears not to empower the Comptroller to allow a proprietor of a design already registered in one class to register the same design for some other article in the same class. Where a design is registered in two or more classes at different times, all the registrations expire simultaneously.[10] A design may be registered as applicable to a "set" of articles, that is, a number of articles of the same general character usually sold or used together, all bearing the same design, with or without modification not sufficient to alter the character or not substantially affecting the identity thereof.[11] The applicant must also lodge the proper number of representations or specimens of the design, and comply with various formalities, and furnish, if required, certain further information, in terms of the rules.[12] The Comptroller makes a search; he may allow

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[1] Official Reports of Patents, Designs, and Trade Mark Cases are published by the Board of Trade, and are here cited as R.P.C.; *Hunter & Co.* v. *Rollason*, 1898, 15 R.P.C. 441.

[2] *Walker, Hunter & Co.* v. *Falkirk Iron Co.*, 1887, 4 R.P.C. 390; 14 R. 1072.

[3] *Moody* v. *Tree*, 1892, 9 R.P.C. 333; *Bayer* v. *Symington*, 1907, 24 R.P.C. 65; 1908, 25 R.P.C. 56.

[4] *Werner Motors, Ltd.* v. *Gamage, Ltd.*, 1903, 21 R.P.C. 137, 621; [1904] 1 Ch. 264, 2 Ch. 580; *Re United States Playing Card Co.*, [1908] 1 Ch. 197.

[5] *Moody, supra.* [6] *Bayer, supra.*

[7] *Walker, Hunter & Co.* v. *Falkirk Iron Co.*, 1887, 4 R.P.C. 390; 14 R. 1072.

[8] 1907 Act, s. 49. [9] Sec. 49.

[10] Sec. 50 (amended, 1919 Act, Sch.). [11] 1920, Rule 5.

[12] Statutory Rules and Orders, 1920, No. 337, which deal with applications, recognition of agents, registration of assignments, cancellation of registration, exercise of discretionary powers, searches, amendments, certificates by Comptroller, marking of articles, and other matters. See also "Instructions to Persons who wish to Register Designs": which may be had from the Sales Branch, Patent Office, 25 Southampton Buildings, London, W.C.

correction of clerical errors, and certain other amendments. After giving the applicant an opportunity of being heard he may refuse to register, but any person aggrieved by any such refusal, except where the refusal is given on a ground mentioned in s. 75 of the 1907 Act, may appeal to the Court,[1] which shall, if required, hear the applicant and the Comptroller, and may make an order determining whether, and subject to what conditions, if any, registration is to be permitted; and if the design is registered, the Comptroller grants a certificate of registration to the proprietor of the design.[2]

1252. There is kept at the Patent Office a register of designs in which must be entered the names and addresses of proprietors of registered designs, notifications of assignments and of transmissions of registered designs, and such other matters as may be prescribed. The register is *prima facie* evidence of any matters directed or authorised by the Act to be entered in it.[3] The registration has to all intents the like effect against the Crown as it has against a subject.[4]

Section 3.—Novelty and Originality.

1253. It is essential that the design should be new or original,[5] shewing some real substantial difference from what has gone before;[6] and it must be either substantially novel or substantially original, having regard to the subject-matter, *i.e.* the purpose to which it is to be applied.[7]

"New" means as applied to a particular article, and "original" means a design which no previous designer has created for any purpose.[8] "The fact that a design which is registered differs from anything which has gone before in shape, pattern, or configuration, is not in itself sufficient to make it a new and original design within the meaning of the Act."[9] The mere putting together of the leading features of goods already on the market, where this involves no mental effort, does not constitute novelty.[9]

A design need not, however, be both novel and original; novelty falling considerably short of originality in the ordinary sense is enough.[10] The novelty must be such as to appeal to the eye. Thus it has been held that a corset which looked the same as an old corset, but was structurally different, was not different therefrom in appearance or shape, and therefore not in "design."[11]

1254. It is not necessary that all the parts of which the design is made up shall be new; the novelty may consist in the combination of

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[1] 1919 Act, Sch., amending 1907 Act, s. 49 (3). [2] Sec. 51.
[3] 1907 Act, s. 52. [4] *Ibid.*, s. 58 A (1919 Act, s. 15).
[5] The words "new or original" are substituted for "new and original" in 1907 Act, s. 50 (1919 Act, Sched.).
[6] See *Le May* v. *Welsh*, 1884, 28 Ch. D. 24; *Smith* v. *Hope*, 1889, 6 R.P.C. 200.
[7] *Re Bach's Design*, 1889, 6 R.P.C. 376; 42 Ch. D. 661.
[8] *Dover* v. *Nürnberger Celluloidwaren Fabrik*, 1910, 27 R.P.C. 498; [1910] 2 Ch. 25.
[9] *Phillips* v. *Harbro Rubber Co.*, 1918, 35 R.P.C., per Astbury J. at 282.
[10] *Hunter & Co.* v. *Rollason*, 1898, 15 R.P.C. 441; *Hutchisons, Ltd.* v. *St. Mungo Co.*, 1907, 24 R.P.C. 265. [11] *Cooper* v. *Symington*, 1893, 10 R.P.C. 264.

old elements in a new way.[1] Thus a design for a tile, made up of an old pattern surrounded by an old border, was upheld, the combination being new; [2] a writing-table has been held to form as a whole a novel design, though no part of the table was novel in itself; [3] a combination of a bassinette and mail-cart has been held good subject-matter; [4] and a combination of an old black-and-white design with a woven pattern has been held to be new and original.[5] The character of the design and the subject-matter to which it is applied as well as previous designs applied to the same or similar subject-matter have to be considered.[6] The novelty or originality must be substantial. These variations which workmen might make in articles of the same kind required by different customers would not constitute an infringement.[7] In some cases the circumstance that the design has been imitated has been held as tending to shew that it was new and original; [8] and so also has the fact that the new design has at once commanded a large sale,[9] though this, as well as the utility of the article,[10] is, in itself, a question distinct from novelty or originality.

1255. It is novelty not in the idea of the design itself which is required, but in its application; thus a picture of Westminster Abbey, taken from a particular point of view, is a good design as applied to a spoon,[11] but it remains open to any other person to apply to a spoon a picture of the same Westminster Abbey, taken from any other point of view, for this constitutes a different design.[12] The Court may find that a design is not novel, on grounds not raised by the objection.[13]

Section 4.—Prior Publication.

1256. If a design has been already registered in one class of goods, it cannot be registered by another person in another class unless the articles are entirely different. Mere change of material (*e.g.* a porcelain lamp-shade instead of a paper one of the same shape) does not

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[1] *Harrison* v. *Taylor*, 1889, 29 L.J. Ex. 3.
[2] *Sherwood* v. *Decorative Tile Art Co.*, 1887, 4 R.P.C. 207.
[3] *Heinrichs* v. *Bastendorff*, 1893, 10 R.P.C. 160.
[4] *Rivett* v. *Grimshaw*, 1894, 11 R.P.C. 351.
[5] *Knowles & Co., Ltd.* v. *John Bennett & Sons*, 1895, 12 R.P.C. 137.
[6] *Phillips* v. *Harbro Rubber Co.*, 1919, 36 R.P.C. 85; *Dover* v. *Nürnberger Celluloidwaren Fabrik*, 1910, 27 R.P.C. 498; [1910] 2 Ch. 25.
[7] *Simmons* v. *Mathieson & Co., Ltd.*, 1911, 28 R.P.C. 486, at p. 491; *Gramophone Co.* v. *Magazine Holder Co.*, 1911, 28 R.P.C. 221, at p. 227.
[8] *Heinrichs, supra*; *Harper & Co.* v. *Wright & Butler Lamp Co.*, 1895, 12 R.P.C. 483; *Nevill* v. *J. Bennett & Sons*, 1898, 15 R.P.C. 412.
[9] *Tyler & Sons* v. *Sharpe Brothers & Co.*, 1893, 11 R.P.C. 35; *Phillips* v. *Harbro Rubber Co.*, 1918, 35 R.P.C. 276; 1919, 36 R.P.C. 79.
[10] *Moody* v. *Tree*, 1892, 9 R.P.C. 333; *Allan West & Co.* v. *British Westinghouse Co.*, 1916, 33 R.P.C. 157; *British Insulated & Helsby Cables* v. *London Electric Wire Co.*, 1913, 30 R.P.C. 620.
[11] *Saunders* v. *Wiel* (No. 2), 1892, 9 R.P.C. 467, and 10 R.P.C. 29; [1893] 1 Q.B. 470.
[12] *Saunders* v. *Wiel* (No. 1), 1892, 9 R.P.C. 459.
[13] *Vandervell & Co.* v. *Lundberg & Sons*, 1916, 33 R.P.C. 60.

constitute novelty of design.[1] But where purpose and materials are both different, there may be sufficient novelty to support the design; thus the adoption, for kitchen-range fire-doors, of mouldings already in use for doors of various articles of furniture has been held novel.[2] Now by the Act,[3] where a design has been registered in one or more classes of goods, the application of the proprietor to register it in other classes is not to be refused on the ground of previous registration or previous publication by application to the goods with respect to which it is registered.

1257. Except where s. 50 applies, a design cannot be registered if it has been previously published in the United Kingdom. There are few design cases on the point, but cases of patent and copyright may be safely referred to. Prior publication may be—(1) by prior user, though discontinued, in such circumstances that the design might have been seen by the public whether any of them actually saw it or not.[4] But experimental user is not publication though made before strangers;[5] (2) by description in a book or document published in England, or sold or accessible to the public in libraries there, sufficient to enable those conversant with the subject to constitute the design.[6] But description in the provisional specification of a patent is not publication,[7] and it is an open question whether prior abandoned registration of the design is so; (3) by public exhibition, except at an industrial or international exhibition certified by the Board of Trade[8]—the exhibitor must give notice to the Comptroller as set out in the section; (4) by communication to third persons, unless confidential.[9] The Act provides[10] that disclosure to a person in such circumstances as to make it contrary to good faith for him to use or publish the design, and in the case of textile goods, the acceptance of a first and confidential order, are not to be publication. The exhibition of a design to a customer before registration with a view to getting an order is equivalent to publication.[11]

Section 5.—Copyright in Designs.

1258. When the design has been registered, the registered proprietor of the design has (s. 53 of the Act) copyright therein for a period of five

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[1] *Re Bach's Design*, 1889, 42 Ch. D. 661, 6 R.P.C. 376; cf. *Read and Gresswell's Design*, 1889, 42 Ch. D. 260, 6 R.P.C. 471.

[2] *Walker, Hunter & Co.* v. *Falkirk Iron Co.*, 1887, 14 R. 1072; 4 R.P.C. 390.

[3] Sec. 50.

[4] *Re Sherwood's Design*, 1892, 9 R.P.C. 268; see also *Gill* v. *Coutts*, 1896, 13 R.P.C. 125; *Stead* v. *Williams*, 1843, 2 W.P.C. 126, 136.

[5] *Cornish* v. *Keene*, 1835, 1 W.P.C. 508.

[6] *Harris* v. *Rothwell*, 1887, 35 Ch. D. 416, 4 R.P.C. 225; cf. *Plimpton* v. *Spiller*, 1877, 6 Ch. D. 412.

[7] *Werner Motors, Ltd.* v. *A. W. Gamage, Ltd.*, 1903, 21 R.P.C. 137, 621; [1904] 1 Ch. 284; 2 Ch. 580.

[8] The Act, s. 59 (1).

[9] *Blank* v. *Footman*, 1888, 39 Ch. D. 678, 5 R.P.C. 653; *Winfield* v. *Snow*, 1891, 8 R.P.C. 15; *Heinrichs* v. *Bastendorff*, 1893, 10 R.P.C. 160; *Nevill* v. *J. Bennett & Sons*, 1898, 15 R.P.C. 412.

[10] Sec. 55.

[11] *British Insulated & Helsby Cables* v. *London Electric Wire Co.*, 1913, 30 R.P.C. 620.

years from the date of registration, *i.e.* from the date of application,[1] which may be extended by successive prolongations to fifteen years—that is, he has the exclusive right to apply it to any article in any class of goods in which the design is registered.[2] The copyright obtained by registration in the United Kingdom (which includes the Isle of Man and Channel Islands) has no extra-territorial application, so that it is open to anyone, even though he lives in the United Kingdom, so long as he makes and sells wholly abroad, to imitate and apply the copyright design in foreign countries.[3] But within the United Kingdom, during the existence of the copyright in any design, it is not lawful for any person,[4] without the licence or written consent of the registered proprietor, to apply, or cause to be applied, such design, or any fraudulent or obvious imitation thereof, in any class of goods in which such design is registered, for purposes of sale, to any article, or to do anything with a view to enable the design to be so applied, nor,[5] knowing that the design, or any fraudulent or obvious imitation thereof, has been applied to any article without the consent of the registered proprietor, to publish or expose, or cause to be exposed or published for sale, that article. A licence only justifies the user contemplated by it,[6] but licence to vend involves authority to the vendee to resell.[7]

1259. The proprietor of a design is, in general, originally the author of the design, but he may also be any person who employs the author to execute the work for good consideration.[8] One who merely suggests the idea is not the author, but if he also superintends the execution he is.[9] The proprietor may also be anyone who acquires the design or the right to apply it to any article, either exclusively or as a co-proprietor (s. 93 as amended by 1919 Act, Sch.).[10] Licensees may be registered as proprietors, but not exclusive agents for sale who are not empowered to manufacture or apply.[11] Assignees and licensees can only be registered after the original proprietor.[12] It would appear that any licence to apply a design ought to be in writing.[13] Lastly, the proprietor may be a person on whom the property in the design, which is moveable, has devolved, such as the representatives or trustee in bankruptcy of the original proprietor.

1260. When any person becomes interested as a mortgagee, or licensee or otherwise in a design, he must make application to the Comptroller

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[1] Sec. 49 (5).
[2] Sec. 60.
[3] *Potter & Co.* v. *Braco de Prata Printing Co.*, 1891, 18 R. 511; 8 R.P.C. 218.
[4] Sec. 60 (1) (*a*).
[5] Sec. 60 (1) (*b*).
[6] *Marshall* v. *Bull*, 1900, 16 T.L.R. 501; 17 T.L.R. 684.
[7] *Thomas* v. *Hunt*, 1864, 17 C.B.N.S. 183.
[8] Sec. 93, as amended by 1919 Act, Sched.
[9] *Pearson* v. *Wilkinson*, 1906, 23 R.P.C. 738.
[10] See *Lazarus* v. *Charles*, 1873, L.R. 16 Eq. 117; 42 L.J. Ch. 507; *Nevill* v. *Bennett & Sons*, 1898, 15 R.P.C. 412.
[11] *Re Guitermann's Design*, 1886, 55 L.J. Ch. 309.
[12] *Jewitt* v. *Eckhardt*, 1878, 8 Ch. D. 404.
[13] *Wooley* v. *Broad* (No. 1), [1892] 1 Q.B. 806; 9 R.P.C. 208.

to register his title, and the Comptroller, on proof of title to his satisfaction, must cause notice of his interest to be entered on the register with particulars of the instrument, if any, creating such interest; [1] but no notice of any trust, expressed, implied, or constructive, is to be entered on the register or receivable by the Comptroller.[2] It has been explained that this only means that no one is to clog the register by simply giving notice of a trust; it does not prevent any document creating an equitable proprietorship from being entered, and the equitable owner is entitled to all the rights of a registered proprietor.[3]

Section 6.—Rectification of Register.

1261. The Court can order rectification of the register at the instance of any person aggrieved.[4] The High Court in England has jurisdiction even where the registered proprietor is domiciled in Scotland. It is a question on which there are conflicting opinions whether the Scottish Courts have concurrent jurisdiction.[5] Probably they have not. The Scottish Courts can, however, declare that the design was improperly entered, or was incapable of registration, and should be expunged.[6] The application is intimated to the Comptroller, who may appear and may also be directed by the Court to appear. The rectification may be by making, expunging, or varying an entry. A copy of the order is served on the Comptroller, who rectifies accordingly. The applicant must have a legal grievance, but it is not necessary that he should be suffering serious damage.[7] Persons aggrieved include those in the same trade, and dealing, or *bona fide* intending to deal, in the same article,[8] proprietors of previously registered designs who allege prejudice,[9] alleged infringers,[10] and generally persons setting up some right or title which is interfered with by the registration. There is an appeal from the High Court to the Court of Appeal.

1262. In the event of a company changing its name, the Comptroller can rectify the register by order of the Court,[11] or apparently without such an order under s. 71 of the Act.[12]

Section 7.—Cancellation of Entry.

1263. The Comptroller may, on the application of any person, and after inquiry, cancel the design, without appeal, on the ground that

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[1] Sec. 71 (2). [2] Sec. 66.

[3] *Stewart* v. *Casey*, [1892] 1 Ch. 104, 9 R.P.C. 9; see also the Act, s. 71. [4] Sec. 72.

[5] See *Cowie Brothers & Co.* v. *Herbert*, 1896, 14 R.P.C. 436; *Dewar & Sons, Ltd.* v. *Dewar*, 1899, 2 F. 249, 17 R.P.C. 341; *Bayer* v. *Connell Brothers & Co.*, 1897, 14 R.P.C. 275; *Reid* v. *Thomson & Co.*, 1905, 22 R.P.C. 376. [6] *Dewar, supra.*

[7] *Re Apollinaris Co.'s Trade Mark*, [1891] 2 Ch. 186; 8 R.P.C. 137.

[8] *Smith* v. *Hope*, 1889, 6 R.P.C. 200; *Re Bach's Design*, 1889, 42 Ch. D. 661; 6 R.P.C. 376. [9] *Read & Gresswell's Design*, 1889, 42 Ch. D. 260.

[10] *Great Tower Tea Co.* v. *Smith*, 1889, 6 R.P.C. 165.

[11] *Re Pneumatic Tyre Co.'s Design*, 1894, 11 R.P.C. 636.

[12] Cf. *Re New Ormonde Cycle Co.'s Trade Mark*, 1896, 13 R.P.C. 475.

it is used for manufacture exclusively or mainly outside the United Kingdom.[1] Cancellation of a design by consent is not permitted when proceedings are in Court. An application for the cancellation of the registration of a design, under s. 58, on the ground of prior publication, may now be made to the Comptroller.[2] When the Comptroller is of opinion that there has not been sufficient time to develop the manufacture of an article in this country he may adjourn an application for the cancellation of the design.[3] The procedure in applications for cancellation is detailed in the 1920 Rules.[4] Certified copies of entries in the register, relating to the design, can be obtained, bearing the seal of the Patent Office; this seal makes them evidence in all His Majesty's Courts.[5]

Section 8.—Inspection of Register.

1264. The design as recorded on the register is,[6] so long as the copyright lasts, or for such shorter period, not being less than two years from the registration, as may be prescribed, not open to inspection except by the proprietor, or by a person authorised (in writing) by the proprietor, the Comptroller, or the Court, or by an applicant for registration of a design when his application has been refused by the Comptroller on the ground of identity with the already registered design; and in all these cases only in the presence of the Comptroller or of an officer of the Patent Office; and no copy of the design or of any part thereof, can in any case be made. If a person furnishes the Comptroller with such information as to enable him to identify a design, the Comptroller is to inform him as to whether the registration of that design exists, and in what class of goods, who is the owner, his address, and the date of registration.[7] After expiration of copyright or the shorter period prescribed, the design may be inspected and copied. Abandoned designs are not open to inspection.

Section 9.—International Convention.

1265. Persons who have registered designs in any country which is a member of the International Convention for the Protection of Industrial Property have a right of priority for four months in the other countries, during which time they may register their designs in spite of any acts accomplished in the interval, *e.g.* another registration, publication or sale; the registration is dated as of the date of the foreign application. Most countries and colonies are members of the Convention, which was signed on 20th March 1883, amended by the Brussels Act of 14th December 1900, and revised at Washington on 2nd June 1911. It was suspended by the War of 1914–1918, but by the Treaty of

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[1] *Bartholomew* v. *Noble & Jarvis*, 1914, 31 R.P.C. 419.
[2] 1920 Rules, Rule 66.
[3] Sec. 58.
[4] Rules 66–72.
[5] Secs. 78 and 79.
[6] 1907 Act, s. 56.
[7] Sec. 57.

Peace between the Allied and Associated Powers and Germany[1] it again came into force and received effect so far as not affected or modified by the exceptions and restrictions resulting therefrom.

Section 10.—Marking.

1266. Before delivery on sale (even though only abroad) every article must be marked with the prescribed mark[2] (Registered, Reg$^{d.}$ or R$^{d.}$), and also (except in the case of articles to which have been applied designs registered in Classes 9, 13, 14, and 15) with the number appearing in the certificate of registration; but the requirements of the Acts and Rules as to the marking of articles to which registered designs are applied are dispensed with as regards printed cotton piece goods except handkerchiefs.[3] Under the previous Acts, failure to mark, though it were only one article, avoided the copyright, unless the proprietor shewed that he took all proper steps to ensure the marking; but now it only disentitles the proprietor to recover any penalty or damages in respect of any infringement of his copyright unless he shews as aforesaid, or that the infringement took place after the guilty person knew, or had received notice, of the existence of the copyright; he does not now lose his right to interdict. It is not sufficient for the proprietor to direct his workmen or manufacturing agents to mark; he must take precautions to ensure that his instructions are carried out ;[4] but a mere blunder will not necessarily be fatal.[5] The question whether proper precautions have been taken is a jury one. No harm is done by the owner putting wrong registered numbers on the articles, if these numbers are in addition to, and not instead of, the right ones.[6]

1267. The mark is to appear on each article, and to be so placed as to apply plainly to the part of the article registered. Difficult questions arise on these points.[7] A proprietor may lose his rights without fault of his own where a co-proprietor neglects to mark, but apparently not where a licensee, not being a proprietor, does so.[8]

Section 11.—Infringement.

1268. The registered proprietor alone has an action for infringement; the licensee, not being a proprietor, apparently has not.[9] Where

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[1] *Vide* Treaty, Arts. 286, 306 *et seq.*; 1907 Act, s. 91, amended by 1919 Act, Sch. as to international and colonial arrangements; also, The Patents, Designs, and Trade Mark Acts by Fletcher Moulton and Evans Jackson, pp. 63, 92; Romer, Patents and Designs Practice, 2nd ed., pp. 27, 98, 142.

[2] Sec. 54. [3] 1920 Rules, Rule 63. [4] *Johnson* v. *Bailey*, 1893, 11 R.P.C. 21.

[5] *In re Rollason's Design*, 1897, 14 R.P.C. 893, 909; 15 R.P.C. 441; *Vandervell & Co.* v. *Lundberg & Sons*, 1916, 33 R.P.C. 60; [1898] 1 Ch. 237; 1898 [A.C.] 499.

[6] *Harper & Co.* v. *Wright & Butler Lamp Co.*, [1895] 2 Ch. 593; [1896] 1 Ch. 142.

[7] *Blank* v. *Footman*, 1888, 39 Ch. D. 678, 5 R.P.C. 659; *Hothersall* v. *Moore*, 1892, 9 R.P.C. 27; *Ingram & Kemp* v. *Edwards Brothers*, 1904, 21 R.P.C. 463; *Lea & Perrins* v. *Price & Sons*, 1905, 22 R.P.C. 122. [8] *Wedekend* v. *General Electric Co.*, 1897, 14 R.P.C. 190.

[9] *Wooley* v. *Broad* (No. 1), [1892], 1 Q.B. 806, 9 R.P.C. 208; but see *Heap* v. *Hartley*, 1889, 42 Ch. D. 461; 6 R.P.C. 495.

there are co-proprietors, any of them may bring an action. The proprietor of a design registered in one class has no action against anyone who applies his design outside that class;[1] and as any person who infringes, not by applying the design, but merely by publishing, selling, or exposing for sale, must be shewn to have known that the consent of the registered proprietor had not been given to its application, the innocent retail dealer is protected;[2] but notice does not require to be proved, only knowledge, however derived. The registered proprietor has at common law a right to interdict, and by statute he has an alternative right of suing for penalties,[3] not exceeding £50 for each offence, and £100 in all, as a simple contract debt,[4] or for damages.

1269. Whether an infringement has been committed is a question of fact, and must be judged of by the eye.[5] Account may be taken of the state of knowledge at the time, and in what respects the registered design was new and original, when considering whether variations from the registered design were material or not.[6] The design, as applied by the alleged infringer, must be the same as, or an obvious or fraudulent imitation of, the registered design; and differences in detail do not necessarily prevent a design from being an obvious imitation of another if the general impression it leaves on the skilled eye is that it has been clearly taken from that other.[7] Even if so varied as not to be an obvious imitation, it may be a fraudulent imitation if the differences are not in essence or are not the result of separate invention, but are merely introduced to slur over the imitation;[8] where the alleged infringer has instructed a designer, or has himself attempted, to produce a design after the style of one already registered, there will be a heavy onus on him to prove that the resemblances do not amount to infringement.[9] Of course the differences may be so great as to prevent there being such similarity as will amount to infringement;[10] and if this be so, a design may be good even though it be founded on a previous design.[11] Where golf balls, though similar in details, could readily be

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[1] *Read & Gresswell's Design*, 1889, 42 Ch. D. 260; 6 R.P.C. 471.

[2] *Smith* v. *Lewis Roberts & Co.*, 1888, 5 R.P.C. 611; *Jan* v. *Grossman*, 1895, 12 R.P.C. 537.

[3] Sec. 62 (2).

[4] But see *Saunders* v. *Wiel* (No. 2), [1893] 1 Q.B. 470; 9 R.P.C. 467; *Sherwood* v. *Decorative Art Tile Co.*, 1887, 4 R.P.C. 212; and *Hildesheimer* v. *W. & F. Faulkner, Ltd.*, [1901] 2 Ch. 552, as to the amount of penalty given.

[5] *Holdsworth* v. *M'Crea*, 1867, L.R. 2 H.L. 380, 386; *Staples* v. *Warwick*, 1906, 23 R.P.C. 609.

[6] *Hecla Foundry Co.* v. *Walker, Hunter & Co.*, 1889, 16 R. (H.L.) 27; 6 R.P.C. 554.

[7] *Harper & Co.* v. *Wright & Butler Lamp Co.*, 1895, 12 R.P.C. 483; *Hecla Foundry Co.*, *supra*.

[8] *Sherwood* v. *Decorative Art Tile Co.*, 1887, 4 R.P.C. 207; *Grafton* v. *Watson*, 1884, 51 L.T.N.S. 141.

[9] *Nevill* v. *J. Bennett & Sons*, 1898, 15 R.P.C. 412; *Harper & Co.* v. *Wright & Butler Lamp Co.*, *supra*, at p. 493.

[10] *Demartial & Co.* v. *Booth*, 1892, 9 R.P.C. 499; *Walker & Co.* v. *Scott & Co.*, 1892; 9 R.P.C. 482; *Birkin & Co.* v. *Pratt, Hurst & Co.*, 1895, 12 R.P.C. 371.

[11] *Harper & Co.*, *supra*, at p. 491; *Holden* v. *Hodgkinson Bros.*, 1904, 22 R.P.C. 102.

distinguished from every point of view, there was held to be no infringement.[1]

Section 12.—Action of Infringement.

1270. In Scotland the action for infringement may be brought in the Sheriff Court, or in the Court of Session before any Lord Ordinary, with right of appeal in ordinary course. The Sheriff may decide as to the validity.[2] In most cases infringement of design is tried simply on a note of suspension and interdict before the Lord Ordinary, the prayer being somewhat in the following form:—"To interdict, etc., the respondent from infringing the copyright of a registered design for golf balls (No. of Class), the property of the complainers, conform to certificate of registration, dated the of , and in particular from making, vending, or using any golf ball (*or* any article in the said class) having a design applied thereto the same as or in fraudulent or obvious imitation of the said registered design other than golf balls to which the said design has been applied by or by the licence or written consent of the complainers, and from infringing the copyright of the said registered design in any other way."[3] The right to sue for damages or penalties should be reserved in a note of suspension and interdict, but if desired, the action may be for interdict, for delivery of the infringing designs, and either for penalty or damages, but not for both. The amount of the damages will in general be the profits lost to the pursuer through the defender's actions, the profits he would have made if he had sold the articles himself. Instead of penalty or damages, the pursuer may also elect to take an account of and recover the profits made by the defender. There is a *prima facie* right to interdict where infringement or intention to infringe are proved, but interdict may be refused when the infringement is merely casual, and there is no fear of its repetition.[4]

1271. The usual defences are (1) no title to sue—the pursuer is not a registered proprietor; (2) the design was never properly registered in the class to which the alleged infringing goods belong; (3) the copyright has lapsed; (4) the design is not proper subject-matter for registration; (5) it is not new or original; (6) prior publication; (7) that articles to which the design applies have not been properly marked—this plea may still be taken in some cases and to some effects;[5] (8) that the pursuer has manufactured wholly or mainly abroad; (9) no infringement; (10) licence; (11) that the defender did not apply the design, and did not know it had been applied without the proprietor's consent. A decision as to the validity of a design is only *res judicata*

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[1] *Hutchison, Main & Co., Ltd.* v. *St. Mungo Manufacturing Co.*, 1907, 24 R.P.C. 265.

[2] *Gill* v. *Cutler*, 1895, 23 R. 371.

[3] *Walker, Hunter & Co.* v. *Falkirk Iron Co.*, 1887, 14 R. 1072; *Hutchison, Main & Co., Ltd., supra.*

[4] *Proctor* v. *Bayley*, 1889, 42 Ch. D. 390, 400; *Werner Motors, Ltd.* v. *A. W. Gamage, Ltd.*, 1903, 21 R.P.C. 137, 621.

[5] See para. 1266, *supra.*

between the parties to the action, but in *Walker* [1] it was ruled that the Outer House would follow a previous decision of the Inner House on the point so far as applicable. There are no statutory provisions as to the particulars of breaches or objections necessary, as in the case of patents, but each party's averments must, according to our general rules of pleading, be sufficiently detailed to give the other party fair warning of the exact case to be made; the breaches and anticipations relied on ought, therefore, to be specifically stated on record.[2]

Section 13.—Certificate that Validity has been in Question.

1272. In an action for infringement the Court may grant a certificate that the validity of any claim in the specification of the design came in question, with the result that in any future successful action for infringement of such claim the pursuer, unless the Court directs otherwise, may have his full expenses as between solicitor and client so far as that claim is concerned.[3] The pursuer gets his certificate of validity if he succeeds in that branch of the case, though he fail on infringement.

Section 14.—Action for Threats.

1273. Where any person claiming to have an interest in a registered design, by circulars, advertisements, or otherwise threatens any other person with legal proceedings or liability in respect of any alleged infringement thereof, any person aggrieved thereby may bring an action against him, and may obtain interdict and damages (if any), if he prove that there was in fact no infringement, provided that the section is not to apply if a *bona fide* action for infringement is commenced and prosecuted with due diligence.[4] A circular may be a threat though addressed to no one in particular,[5] but a mere general warning is not enough.[6] The Court has a discretion as to granting interdict.[7]

Section 15.—Offences.

1274. Where, pending an action for infringement, the pursuers published a circular stating that the defenders had applied an obvious or fraudulent imitation of their design, it was restrained as a contempt of Court.[8] Any person who falsely describes any design applied to any article sold by him as registered, *e.g.* by marking it with the word registered, is liable to a fine not exceeding five pounds for each offence,[9]

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[1] *Walker, Hunter & Co.* v. *Hecla Foundry Co.*, 1888, 15 R. 660; 5 R.P.C. 71, 365.
[2] Cf. *Mica Insulator Co., Ltd.* v. *Bruce Peebles & Co., Ltd.*, 1905, 7 F. 944.
[3] 1907 Act, s. 61; s. 35, as amended by 1919 Act (Sched.).
[4] 1907 Act, s. 61; s. 36, as amended by 1919 Act (Sched.).
[5] *Johnson* v. *Edge*, 1891, 9 R.P.C. 142. [6] *Bishop* v. *Inman*, 1900, 17 R.P.C. 749.
[7] *Walker* v. *Clarke*, 1887, 4 R.P.C. 111.
[8] *St. Mungo Manufacturing Co.* v. *Hutchison, Main & Co., Ltd.*, 1908, 25 R.P.C. 356.
[9] Sec. 89.

on prosecution in the Sheriff Court.[1] Each sale of the article constitutes a separate offence.[2] It is no defence that the article has been registered and the registration has expired.[3] To make or cause to be made a false entry on the register is a "misdemeanour."[4]

SECTION 16.—ROYAL ARMS.

1275. For the unauthorised use of the Royal Arms a penalty of £20 may be recovered in the Sheriff Court.[5]

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[1] Sec. 94 (2). [2] *R.* v. *Crampton*, 1886, 3 R.P.C. 367.
[3] Sec. 89. [4] Sec. 89 (1). [5] Sec. 90 (2).

DESTINATION.

See DISPOSITION; VESTING IN SUCCESSION.

DESTRUCTIVE INSECTS ACT.

See COUNTY COUNCIL.

DESUETUDE.

See STATUTE LAW.

DEVIATION.

See CARRIAGE BY SEA.

DEVICE.

See TRADE MARKS.

DEVOLUTION.

See ARBITRATION; AUCTION; ENTAIL.

DIES CEDIT, DIES VENIT.

See LEGACIES; OBLIGATIONS; VESTING IN SUCCESSION.

DIES INCEPTUS PRO COMPLETO HABETUR.

See TIME, COMPUTATION OF.

DIES INCERTUS PRO CONDITIONE HABETUR.

See VESTING IN SUCCESSION.

DIET.

See CRIME (PROCEDURE); PRACTICE AND PROCEDURE.

DIGNITARIES, ECCLESIASTICAL.

See CHURCH; PRECEDENCE.

DIGNITIES.

See PEERAGE AND OTHER DIGNITIES.

DILIGENCE FOR RECOVERY OF WRITINGS.

See COMMISSION AND DILIGENCE.

DILIGENCE OF CREDITORS.

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Section 1.—General.

1276. "Diligences are certain forms of law by which a creditor endeavours to make good his payment, either by laying hold of and imprisoning the person of the debtor, or by securing his estate from alienation or embezzlement, or by carrying the property of it directly to himself." [1] Stair connects the term diligence with the ordinary meaning of the word: "because they excuse the users thereof from negligence, whereby posterior diligences being exactly followed, are preferable to prior diligences being neglected, *vigilantibus non dormientibus jura subveniunt.*" [2] The opinion of Ross is that the word is purely French, and is the ordinary practical term synonymous with the word *pursuit*.[3] The origin of the term is discussed by Graham Stewart in the Introduction to his Law of Diligence.[4]

1277. The sentence of a judge is always a necessary preliminary to diligence, although originally the only warrant required by a superior was that of his own Barony Court.[5] A creditor may proceed to use diligence when he has obtained a judgment in a suit against his debtor, or has extracted a deed registered in virtue of the debtor's consent in the books of a competent Court for execution. Bills of exchange contain no clause of registration, but are registrable by statute.[6] The creditor is not restricted to one form of diligence, but may use simultaneously all appropriate forms. In executing diligence the creditor must be careful to carry out in detail all the formalities required, as in all matters affecting diligence, precision, and exactness are among the first essentials.[7]

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[1] Ersk. Inst. ii. xi. 1. [2] iv. 41, 1. [3] Lectures, i. 234.
[4] Page 1 *et seq.* [5] Craig, 126. [6] 1681, c. 20; 1696, c. 36.
[7] Per Lord Justice-Clerk Scott Dickson in *Mitchell* v. *St Mungo Lodge of Ancient Shepherds*, 1916 S.C. 689, at p. 693.

Diligence may proceed against the debtor's person, or against his property (heritable or moveable).

Section 2.—Diligence against the Person.

Subsection (1).—*History.*

1278. According to our earliest law the only diligence competent against an ordinary debtor was that against his moveable estate. This was due to the operation of the feudal law, which withdrew land from commerce, thus rendering it unavailable to creditors, and at the same time prevented the attachment of the debtor's person, as being inconsistent with the right of the superior to the personal services of his vassal. Kings no doubt always exercised the power of imprisoning their debtors, and from a very early time imprisonment followed upon failure to implement decrees obtained on obligations *ad facta præstanda* within the obligant's power to perform. But in the case of the ordinary debtor personal execution was the last diligence to be introduced into our law.[1] The Statute 2 Robert I. c. 19, first gave this remedy to creditors. This statute, which is the foundation of the Act of Warding peculiar to royal burghs, was borrowed from England, and incorporates almost verbatim the provisions of the Statute Merchant of 11 Edw. I. On the narrative that many merchants had fallen into poverty for want of a speedy remedy for recovering their debts, it is enacted "failing goods, the body of the debtor is to be taken and kept in prison till he agrees with his creditor." Except in royal burghs under an Act of Warding, the remedy thus introduced only applied to merchants, and by some authorities the Act is regarded as altogether spurious.[2] We find no statutory enactments extending the remedy till after the Reformation. Indirectly, however, imprisonment for debt came to be commonly adopted through the medium of the Church. It was customary for a debtor to bind himself by an oath to pay, and if he failed he became liable to Church discipline. Gradually enforcement of payment of debt came to be considered the province of the Church, and the authority of the Church was, if necessary, enforced by the arm of the law.

1279. From a very early time the bishop had power to decide "all actions pertaining to faith of body, with power to cause the people to keep their faith, and to punish them for violation thereof"; and by chap. 6 of Stat. Robert III. it was ordained that "all Justiciars, Sheriffs, and others the King's ministers shall wait upon, and answer to all letters of Caption to be direct to them, by all bishops, and their officials, and shall cause make lawful execution of the same."[3] The sentences of the Church Courts were followed by excommunication, and when this failed to produce the desired effect, a writ of caption was issued, which the civil Courts were bound to enforce. By 6 James II. c. 12, absconding debtors, who left no property behind them, besides being excom-

[1] Graham Stewart, Diligence, p. 2. [2] Bell, Com. ii. 431. [3] Balfour, Practicks, p. 682.

municated by the Church, were made rebels to the King, by being proclaimed outlaws or put to the horn. The object of having a debtor declared an outlaw was to convert a writ which might and probably would be regarded by every petty laird as an infringement of his baronial rights into one which, emanating from the paramount superior, overrode that of all others. As the Reformation approached, the power of the Church, which was losing its hold on the people, was supported by more drastic measures, and it was provided by 4 James V. c. 9, that both body and goods might be attached at the same time for liquid debts; and if the debt was not thereby paid, and the person had been cursed for not doing any act or deed, he should be denounced a rebel.

1280. At the Reformation the jurisdiction of the Church in these matters was swept away. It was soon found necessary to provide a substitute; and Commissary Courts were established in 1563, to which was transferred the jurisdiction formerly exercised by the Church Courts. Upon the decrees of this Court *in facto* the Court of Session issued letters of four forms, and upon its decrees for payment of money letters of poinding. It was provided by the Statute 1584, c. 139, that letters of horning, as well as of poinding, should follow on the decrees of the Supreme Court as well as upon decrees of other judges, to which the authority of the Lords of Session should be interponed. In practice, however, the old style of four forms continued to be used for some time afterwards. But by Act 13 James VI. c. 181, it was enacted that, upon the decrees of magistrates in burghs, letters of four forms were to be reduced to one charge of ten days. This was extended to decrees of other inferior Courts by the Acts 1606, c. 10; 1607, c. 6; 1609, c. 15; 1612, c. 7; and finally to those of the Court of Session itself by Act of Sederunt, 23rd November 1613.[1]

Subsection (2).—*Letters of Four Forms.*

1281. Imprisonment for failure to perform obligations *ad facta præstanda* used to proceed upon letters of four forms. These letters directed four successive charges to be given to the obligant at intervals of three days, and, on failure to perform, he had the alternative given him of entering himself a prisoner in one of the jails; if he did not do so, he was denounced rebel, and letters of caption followed. When the decree, upon which letters of four forms were issued, was pronounced by an inferior judge, the creditor had to raise an action in the Supreme Court in which he produced his decree, and got another in similar terms, called a "decree conform," on which the letters were raised. The change to the more modern style of letters of horning is supposed to have been brought about by the practice of taking debtors bound to consent to execution upon a single charge.[2]

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[1] Bell, Com. 234 *et seq.*; Kames, Law Tracts, p. 331 *et seq.*; Ross, Lectures, i. 234 *et seq.*; M. Bell, Lectures, i. 519; Graham Stewart, Diligence, p. 706.

[2] Ross, Lectures, i. 313.

Subsection (3).—*Letters of Horning.*

1282. Letters of horning were a development from Letters of Four Forms. The change consisted in (1) substituting one charge of (originally) fifteen days for the four charges of three days each formerly required, and (2) in making denunciation of rebellion the immediate result of the obligant's failure to obey the charge, whereas, according to the older style, the alternative was first given of voluntary surrender. To warrant the issue of letters of horning, there must be either (1) a decree obtained in an action against the obligant, or (2) a decree of registration upon a protested bill of exchange, or upon a deed duly registered for execution. There are also a few exceptional cases provided for by special statutes which warrant hornings, which seem to be still competent.[1] Formerly, if the decree were that of an inferior Court, it was necessary to obtain a Decreet Conform from the Court of Session by raising there a new action, as the writ can issue only on a warrant from the Supreme Court. Procedure by Bill was, however, substituted by the Acts 1592, c. 181 ; 1606, c. 10 ; 1609, c. 15; and 1612, c. 7.

1283. The writ, which runs in the name of the Sovereign and passes the Signet, is addressed to messengers-at-arms. It sets forth the ground of debt, and the decree upon which the diligence proceeds. In narrating this, strict accuracy must be observed: [2] any partial payments that may have been made must be specified.[3] Then follows the "will," and an order to the messenger to denounce the obligant rebel on the lapse of the days of charge if payment has not been made. In the case of letters of horning and poinding, warrant to poind and arrest is incorporated. The *inducice*, or days of charge, vary. Where the writ is issued (*a*) upon a decree of registration on a deed wherein the obligant consents to execution within an expressed number of days, the *inducice* will be the number so specified. Consent to a shorter period than six days is unknown in practice, and would probably be ineffectual; [4] (*b*) where issued upon a registered deed in which the registration clause specifies no time, but is in the statutory form provided by the Titles to Land Consolidation (Scotland) Act, 1868,[5] s. 138, the *inducice* are six days; (*c*) on registered protests, six days; [6] (*d*) on all other decrees, where the parties charged are within Scotland, seven days; where in Orkney or Shetland or furth of Scotland, fourteen days.[7]

1284. The messenger having duly served the writ upon the debtor personally, or at his dwelling-house, or edictally, as the case requires, next proceeds to certify, by writing on the back of the letters, that he has given the charge. This attestation, which is known as the messenger's execution or indorsation, must specify all the steps taken; and, so far as

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[1] Jurid. Styles, 3rd ed., iii. 369.
[2] *Brown* v. *Blaikie*, 1849, 11 D. 474.
[3] *M'Martin* v. *Forbes*, 1824, 3 S. 275.
[4] *Forrester* v. *Walker & Hunt*, 27th June 1815, F.C., per Lord Meadowbank.
[5] 30 & 31 Vict. c. 101.
[6] 1681, c. 86.
[7] Court of Session Act, 1868, s. 14.

these are solemnities required by law, they must be fully and accurately set forth.[1] If the debtor failed to fulfil his obligation within the days of charge, the messenger in former days denounced him rebel, by reading the letters and blowing three blasts of a horn at the Market Cross of Edinburgh, or of the head burgh of the shire in which the debtor had his domicile. When the debtor was furth of Scotland the denunciation had to be executed at the Office of Edictal Citations and Market Cross of Edinburgh and pier and shore of Leith.[2] This ceremony (from which the writ received its name) fell into disuse, however, long prior to the passing of the Personal Diligence Act, though the execution of denunciation continued to recite the procedure as if it had actually been gone through. The execution along with the letters of horning was registered within fifteen days in the General or Particular Register of Hornings,[3] or in the Sheriff Court Books of the county within which the rebel resided,[4] and the creditor might obtain letters of caption, which warranted the obligant's imprisonment. When letters of horning and poinding are used, poinding may proceed whenever the days of charge have expired. The proceedings are the same as in the case of a charge in virtue of the Personal Diligence Act, and according to the rules of that Act; the only distinction being that there is no power of opening shut and lockfast places, and a special warrant must be applied for when such power is found necessary.[5] The process of obtaining and executing letters of horning is given in detail by Prof. Ross.

1285. Although the provisions of the Personal Diligence Act,[7] authorising the insertion of warrants to charge in extract decrees, have in ordinary practice superseded entirely the use of letters of horning, these are still in all cases competent;[8] but where the creditor resorts to them unnecessarily, he cannot recover the extra expense from the debtor.[9] Letters of horning may still have to be resorted to in certain cases where the newer form of diligence is not applicable. Such cases arise when the warrant to charge on extract would not of itself afford sufficient evidence of the charger's right, and supplementary evidence requires to be produced.[10]

Subsection (4).—*Denunciation.*

1286. Denunciation signifies the proceedings by which a person was declared to be what is known in the phraseology of Scots law as a rebel, but is perhaps more aptly termed in the English law an outlaw. Denunciation against a person might follow on either a civil action for debt or a criminal action, and its effects were formerly highly penal,

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[1] *Hay* v. *Ballegerno*, 1680, Mor. 3790.
[2] Ersk. 2, 5, 56; Bankt. 3, 3, 5; Graham Stewart, Diligence, p. 707.
[3] 1579, c. 75. [4] 1600, c. 13. [5] Jurid. Styles, 3rd ed., ii. 370.
[6] Lect. i. 280 *et seq.* See also Bell, Com. ii. 435; Bankt. 3, 3, 1; Ersk. ii. 5, 55; Stair, iv. 47, 7; Bell's Prin., s. 2311; Graham Stewart, Diligence, p. 706 *et seq.*
[7] 1 & 2 Vict. c. 118, s. 1; *cf.* para. 1289, *infra.*
[8] *Pollok* v. *University of Glasgow*, 1865, 3 M. 968. [9] 1 & 2 Vict. c. 118, s. 8.
[10] Mackay, Pract. i. 65; *Mitchell* v. *St Mungo Lodge of Ancient Shepherds*, 1916 S.C. 689.

though in modern times they have been considerably mitigated. In civil cases it might be used against anyone who had disobeyed a charge attached to a decree; and in criminal actions against (1) anyone who, having been cited to appear in the High Court of Justiciary, did so accompanied by more than the number of friends and followers allowed by the Act of 1555, c. 41; or (2) anyone who, having been so cited, has failed to appear, and has had sentence of fugitation pronounced against him. The proceedings constituting denunciation were of a most public and formal character. In civil actions for debt the procedure was by letters of horning. In criminal causes, denunciation for a breach of the Statute of 1555 was made at the market cross of the head burgh of the shire in which the Justiciary Court was sitting, and was registered in the books of the shire of the rebel's domicile, or in the Books of Adjournal of the Court of Justiciary; while if it followed a sentence of fugitation, it was effectual if made at the Market Cross of Edinburgh within six days of the sentence of fugitation.[1]

1287. Formerly denunciation, whether following on a civil or criminal cause, deprived the rebel of all his personal and public rights as a member of the community. Having been declared rebel, he might be put to death by anyone with impunity. The Act of 1612, c. 3, rendered this illegal where denunciation followed on a civil cause; but it continued to be legal in criminal cases until 1661,[2] when the law was mitigated, to the extent of its not being allowable to kill or mutilate a rebel unless he had been denounced on a capital charge, and was making a forcible resistance to those endeavouring to arrest him. His whole estate was forfeited—his single escheat, or whole moveable effects, to the Crown; and his liferent escheat, or the income of his heritable property, to his superior, provided in the latter case that the rebel remained unrelaxed for a year and a day. Escheat upon denunciation for civil causes was only entirely abolished by 20 Geo. II. c. 50, and still subsists in the case of a rebel denounced for criminal causes. Lastly, the rebel had no *persona standi in judicio*; but this disability, though not removed by statute, is no longer favoured by the law, and according to Erskine[3] this plea, which is a purely personal one, and cannot be pleaded against the rebel's assignee, even though the assignation be dated after the commencement of the action, would not be sustained against a rebel denounced on a civil debt. The effect of denunciation as regards the creditor in a civil cause was (1) to accumulate the debt, interest due, and expenses into a principal sum bearing interest,[4] even if not registered, and (2) to entitle the creditor to letters of caption.[5]

Subsection (5).—*Letters of Caption.*

1288. To obtain letters of caption the creditor applied to the Court of Session in the Bill Chamber by bill narrating the denunciation and

[1] 1584, c. 140; 1592, c. 126.
[2] 1661, c. 22.
[3] Inst. ii. 5, 60.
[4] 1621, c. 20; Bell, Com. i. 697.
[5] Ross, Lectures, i. 236.

registration of the horning and executions, and praying for letters of caption in ordinary form. Along with the bill were produced the letters of horning and the executions of charge and denunciation, and a certificate by the Keeper of the Register of Hornings or his depute that these had been duly registered. On this bill the Bill Chamber Clerk wrote and signed the deliverance, "*Fiat ut petitur*, Because the Lords have seen the registered horning." The bill was then the warrant for letters of caption. These letters, which are prepared by the agent, proceed in the name of the Sovereign, are signed by a Writer to the Signet, and pass the Signet.

SUBSECTION (6).—*Execution under the Personal Diligence Act.*

1289. The old forms of diligence by letters of horning and caption, though still competent, have been practically entirely superseded by the provisions of the Personal Diligence Act, 1838.[1] By this Act it is provided (ss. 1 and 9) that when an extract shall be issued of any decree pronounced by the Court of Session, Teind Court, Justiciary Court, or Sheriff Court, or of a decree of registration of a bond or other document upon which execution may competently proceed, the extractor shall insert a warrant to charge the debtor to pay within the days of charge under the pain of poinding and imprisonment, and to arrest and poind. Extracts of decrees are thus made equivalent to extracts of such decrees followed by letters of horning, or of horning and poinding in the older form. In virtue of such extract it is lawful to charge the debtor precisely in terms of the decree (s. 3). Upon expiration of the days of charge, and within a year and a day, the execution, which must set forth with strict accuracy the nature and particulars of the warrant, may be registered in the Register of Hornings. Such registration has the same effect as if the debtor had been denounced rebel in virtue of letters of horning; and also accumulates the debt and interest into a capital sum, bearing interest. It is then competent to apply for warrant to imprison the debtor, as it formerly was to apply for letters of caption. The application is made in the Bill Chamber or Sheriff Court, as the case may be, and presented to the Clerk, who writes thereon the words "*fiat ut petitur*," and adds his signature and the date. It is essential that the *induciæ* should have expired before an application for warrant of imprisonment is made. After the issue of the warrant to imprison (or letters of caption in the older form), the messenger proceeds to execute the warrant by touching the shoulder of the debtor with his wand, and informing him that he is his prisoner. He then lodges the debtor in prison. A debtor is protected against personal diligence by retiring within the Abbey of Holyrood, or precincts thereof; but this privilege of sanctuary is of no avail from the moment that the messenger has executed the first step in carrying out the warrant of imprisonment, by touching the debtor on the shoulder.[2]

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[1] 1 & 2 Vict. c. 114.

[2] Graham Stewart, Diligence, p. 708 *et seq.*

Subsection (7).—Meditatio Fugæ *and Border Warrants.*

1290. The *Meditatio Fugæ* Warrant is a diligence used against a debtor who has the intention of leaving Scotland to avoid fulfilling his obligation. It is competent for the creditor who has reasonable ground to suspect such an intention to apply to a magistrate, who, on inquiry and on being satisfied that there are grounds for the application, grants warrant for apprehending the debtor for examination, and may thereafter grant warrant of imprisonment until caution *de judicio sisti* be found. No *meditatio fugæ* warrant can be executed out of Scotland, but it may be granted at the instance of a creditor who resides out of Scotland, provided he has a mandatory in Scotland. The warrant may be granted against a foreigner resident within the jurisdiction. Apprehension and imprisonment under this warrant are expressly excluded from the operation of the Debtors Act, 1880.[1] On finding caution *de judicio sisti*, a debtor imprisoned on a *meditatio fugæ* warrant is always released. These warrants are described in Graham Stewart on Diligence.[2]

1291. The Border Warrant is analogous to the *meditatio fugæ* warrant. It is now in desuetude. The warrant was granted on the application of a creditor to arrest the person or goods of a debtor who resided on the other side of the Border, and to detain him or them until the debtor should find caution *de judicio sisti*, *i.e.* that he would appear as a party to any action raised on the debt. The procedure for obtaining such a warrant seems to have varied in the different Border counties, but, strictly speaking, it could only be obtained from a Judge Ordinary on the creditor's taking oath as to the verity of the debt; and the debtor, after being arrested, was entitled to an examination as to his domicile by the judge before being committed to prison. A detailed report of the practice in the different counties will be found in the case of *Landell* undernoted.[3]

Section 3.—Diligence against Property.

Subsection (1).—*History.*

1292. Attachment of the debtor's moveables was the earliest diligence recognised in the law of Scotland. Poinding, by which the debtor's moveables were directly transferred to the creditor, was a diligence known in our earliest law, and is described in *Quoniam Attachimenta*, c. 49. Letters of poinding, corresponding to a writ of *fieri facias* in England, were used, in virtue of which the goods on the debtor's lands were carried to the market cross of the head burgh of the sheriffdom and there sold.

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[1] But see the case of *Hart* v. *Anderson's Trs.*, 1890, 18 R. 169, where it was held that the warrant was not competent in a case where imprisonment after decree would be incompetent.

[2] Page 682 *et seq.*

[3] *Landell* v. *Landell*, 1838, 16 S. 388; see also Ersk. i. 2, 21; Bell, Com. ii. 449; Mackay, Manual, p. 57.

If a purchaser was not found, goods were apprised to the value of the debt and handed over to the creditor. This diligence was at first exercised under a brieve from Chancery addressed to the Judge Ordinary. But "the inattention of our inferior judges, the changes and irregularities in the procedure of our Courts, brought about a total neglect of the preliminary forms. The ancient brieves, or fixed writs of our Courts upon which all actions commenced, were dropped; complaints and summonses succeeded; and consequently no previous bail was demanded from the defendant either for appearance, during the course of the action, or for disobedience to the sentence to be given." [1] The Judges Ordinary seem then to have adopted the practice of enforcing their own decrees by issuing warrants of poinding, directed to their own officers, which could be executed within the jurisdiction of the judge granting the warrant. After the establishment of the Court of Session, the judges of that Court also issued letters of poinding under the Signet upon their own decrees, or on production of a decree of an inferior judge, which might then be executed in any part of Scotland.[2]

1293. This seems to have been at first the only remedy open to an ordinary creditor, owing, as stated above, to the operation of the feudal law. But the fetters upon the alienation of land were broken down at an early period, and a statute of Alexander II. (c. 24) provided that the debtor's moveables were to be first distrained upon a brieve of distress, and, in default of these, as much of his heritage was to be held as would satisfy the creditor. No provision was made by the statute for a case where a purchaser could not be found, but in practice the judges in such an event adjudged land to the creditor. By 2nd Stat. Robert I. c. 19 (the Statute Merchant, borrowed from England), a merchant creditor was given the privilege of entering upon the debtor's land, of which he might retain possession till his debt was paid. He was not entitled to have the land sold. According to Kames [3] it appears from our records that sometimes land was sold for payment of debt upon the above-mentioned statute of Alexander II., and sometimes that security only was granted upon the land by authority of the Statute Merchant. The debtor had no power of redemption under the law as it stood prior to 1469, but in that year a statute was passed (c. 3) giving to the debtor a power of redemption within seven years. This necessarily rendered the power of sale practically nugatory, and the result was that the diligence came to be restricted to a redeemable transference of an apprised portion of the estate.

1294. After brieves fell into disuse, letters executorial, called letters of apprising, were issued upon decrees obtained upon a summons. They were at first directed specially to the Sheriff within whose territory the lands lay, but afterwards to messengers-at-arms. This led to great abuses. Forms were neglected and lands were not properly valued. It

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[1] Ross, Lectures, i. 266.

[2] 1661, c. 29; Graham Stewart, Diligence, p. 275.

[3] Law Tracts, p. 321.

also became the custom, probably in consequence of the disorder which had crept in, to transfer the proceedings to Edinburgh, and gradually the system was introduced of allowing the creditor to enter on the whole of his debtor's lands upon a redeemable title. A creditor thus entered drew the whole rents without accounting for them, no matter what the amount of the debt due to him. The Acts 1621, c. 6 and 7, and 1661, c. 62, were passed to remedy this state of matters, by providing that the rents beyond the value of the interest upon the debt should be imputed to the discharge of the principal, and ranking *pari passu* all apprisings led within a year and a day of the first. The Act 1672, c. 19, put the diligence upon a new footing altogether, by substituting for letters of apprising the action of adjudication.[1]

Subsection (2).—*Diligence against Heritable Estate.*

1295. The form of diligence available to a creditor against his debtor's heritable estate is termed Real Diligence. Real diligence may be used either by a secured or by an unsecured creditor. The various forms are:—(1) Adjudication for debt; (2) Adjudication in Implement (see Adjudication); (3) Inhibition (*q.v.*); (4) Poinding of the ground (*q.v.*); (5) The Action of Maills and Duties (*q.v.*); (6) Ranking and Sale. This last is an action whereby the heritable property of an insolvent debtor is sold and the price divided among his creditors judicially. The action, which was introduced by the Act 1681, c. 17, can be raised only by a creditor who holds a real security. The procedure was amended by Acts 1690, c. 20 and 1695, c. 6.[2] The process originally consisted of three actions, (1) an action of sale; (2) an action of reduction improbation to test the claims of creditors; and (3) a multiplepoinding to divide the price. The procedure, which is long and complicated, is fully described in the older books on procedure.[3] The action is an Inner House process.[4] Since the Bankruptcy Act, 1856, this action has been practically superseded, but it is still competent.[5]

Subsection (3).—*Diligence against Moveable Estate.*

1296. This comprises:—(1) Arrestment and Furthcoming (*q.v.*); (2) Poinding (*q.v.*); (3) Mercantile Sequestration (see Sequestration); (4) Sequestration of tenant's effects under landlord's hypothec (see Hypothec).

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[1] Kames, Law Tracts, p. 313 *et seq.*; Bell, Com. i. 740 *et seq.*; Graham Stewart, Diligence (Introduction), p. 5 *et seq.*, also p. 525 *et seq.*

[2] Bell, Com. ii. 233; Ersk. ii. 12, 59; Shand, Practice, ii. 864.

[3] Shand, Practice of the Court of Session, ii. 867 *et seq.*; Ivory, Forms of Process, i. 377 *et seq.*; Beveridge, Forms of Process, ii. 513 *et seq.*; see also 19 & 20 Vict. c. 91, s. 2.

[4] Mackay, Manual, p. 177.

[5] *Cannon's Trs.* v. *Lake*, 1883, 21 S.L.R. 101; Goudy on Bankruptcy, 4th ed., p. 497.

Section 4.—Diligence after the Debtor's Death.

Subsection (1).—*Against Heritage.*

1297. By the Act 1661, c. 24, the creditors of the deceased are preferred to those of the heir, provided they do diligence against the lands within three years of the ancestor's death. After the expiry of the three years the ancestor's creditors, though they have done no diligence, may challenge the deed of the heir, but lose their preference in a question with the heir's creditors.[1]

Subsection (2).—*Against Moveables.*

1298. A creditor of the deceased debtor may proceed against the executor who has been confirmed upon the estate, or, where there has been no confirmation, he may have himself confirmed as executor-creditor, to the effect of administering so much of the estate as may be sufficient to satisfy his debt. Confirmation as executor-creditor is of the nature of a diligence, and vests the real right in the creditor so confirmed. See Confirmation of Executors.[2] Diligence begun during the deceased's life may be prosecuted, and will have effect against the executry.[3] By the Act 1695, c. 41, creditors of the deceased doing diligence against the moveable estate within a year and a day of their debtor's death are preferred to the heir.[4]

Section 5.—Alienations in Defraud of Diligence.

1299. The principle of common law *pendente lite nihil innovandum* is extended to diligences. The second branch of the Act 1621, c. 18, provides that any voluntary payment made to, or right conferred on, any person, in defraud of the lawful and more timely diligence of another creditor, may be cut down by that creditor. Thus, under this Act, a creditor who has taken the first step of his diligence can set aside a trust conveyance granted for the general behoof of creditors. The grounds of challenge are, that the alienation, which must be voluntary, has been made after diligence, appropriate to attach the subject alienated, had commenced; and that the debtor was at the time insolvent, notoriously or within the knowledge of the receiver of the deed. The diligence must have begun in a regular manner, and be proceeded with within a reasonable period. The remedy is now of little importance, owing to the provision of the Bankruptcy (Scotland) Act, 1913, applying to ordinary debtors, that the expiry of a charge concurring with insolvency constitutes notour bankruptcy.[5]

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[1] Ersk. iii. 8, 101; Graham Stewart, Diligence, p. 674 *et seq.*

[2] See Vol. IV. p. 360 *ante.* [3] Bell, Com. ii. 77 *et seq.*; Ersk. iii. 9, 34.

[4] Graham Stewart, Diligence, p. 680.

[5] 3 & 4 Geo. V. c. 20, s. 5 (2nd) (A); Goudy on Bankruptcy, 4th ed., p. 57 *et seq.*; Ersk. iv. 1, 37; Bell, Com. ii. 186.

Section 6.—Equalising of Diligences.

1300. At common law and until comparatively modern times the creditor who first used diligence obtained an exclusive preference over the estate thereby attached. The first statutory enactments equalising diligences were passed in the interest of heritable creditors, viz. the Act 1661, c. 62, which provided for the *pari passu* ranking of comprisings or adjudications, and the Act 1681, c. 17, which introduced the process of ranking and sale. The preference acquired by other creditors was not interfered with till the passing of the first Sequestration Act in 1772.[1] The law now regulating this matter is contained in the Bankruptcy Act, 1913, which provides by s. 10 that "Arrestments and poindings which shall have been used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, shall be ranked *pari passu* as if they had all been used of the same date." [2]

Section 7.—Abuse of Diligence.

1301. The use of diligence is always *periculo petentis*, and where injury is caused a claim for reparation will arise if the diligence used is nimious or groundless, or irregularly carried out. Special care must be exercised where the warrant is not obtained as a matter of course, but upon cause shewn, whereby the Court has been induced to grant the order, as in the case of warrants to apprehend a debtor *in meditatione fugæ*. If the decree upon which the diligence proceeds be regular, and the execution regularly carried out, the user will not be liable though it turns out that the decree is reducible upon its merits, nor upon the ground that a milder remedy was available. A mistake in the messenger's execution, if not merely clerical or trivial, or any deviation from the procedure laid down in the Personal Diligence Act, will invalidate the diligence and found an action against the user. An action will lie against a creditor who proceeds with a diligence after the debtor has duly tendered the amount decerned for and expenses of extract; so also if the debtor has obtained a sist of diligence, provided the creditor knows of it.[3] (See Abuse of Civil Process.)[4]

Section 8.—Suspension of Diligence.

1302. A debtor who thinks diligence has proceeded against him without sufficient cause, or is being carried on irregularly, may obtain a stay of execution, till the rights of parties can be determined by a final judgment, if he can make out a sufficient *prima facie* case.[5] A note of suspension must be presented in the Bill Chamber of the Court of Session, setting forth the charge, or threatened charge, and craving relief, with a

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[1] 12 Geo. III. c. 72.
[2] See also Bell, Com. ii. 73; Graham Stewart, Diligence, p. 180 *et seq.*
[3] Graham Stewart, Diligence, p. 761 *et seq.*; Glegg, Reparation, 2nd ed., p. 211.
[4] See Vol. I. p. 21 *ante*.
[5] Graham Stewart, Diligence, p. 753 *et seq.*

statement appended of the facts and pleas in law on which suspension is grounded. The Court of Session alone has jurisdiction in this matter, except in the case of charges or threatened charges for payment where the debt, exclusive of interest and expenses, does not exceed £50, when the suspension may be raised in the Sheriff Court.[1] "There are four stages of diligence at which suspension may be applied for: (1) A charge may be threatened or have been executed, but nothing further done, either the days of charge not having expired, or the charger having delayed or neglected to follow out his charge by poinding or imprisonment. In this case the remedy is a simple suspension. (2) An expired charge may have been followed by poinding, but a sale not yet executed, in which case the remedy is suspension and interdict. (3) An expired charge may have been followed by imprisonment, in which case the remedy is suspension and liberation. (4) An expired charge may have been followed by both imprisonment and poinding, in which case the remedy is suspension, liberation, and interdict."[2] (See SUSPENSION.)

[1] Sheriff Courts Act, 1907 (7 Edw. VII. c. 51), s. 3 (5) and Rule 123.
[2] Mackay, Manual, p. 421.

DILIGENCE BY THE CROWN.

See CROWN, THE; EXCHEQUER.

DIRECTORS.

See COMPANY.

DISCHARGE.

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Section 1.—Definition.

1303. "A discharge is properly the acknowledgment of payment or performance actually made; but it may be granted independently of performance or payment, which is called Acceptilation." [1]

Section 2.—Capacity to grant Discharge.

1304. Capacity to grant a discharge is determined by the same general rules as those which regulate capacity to contract. A pupil having no capacity, the discharge, in relation to any obligation in which he is the creditor, is granted by his tutor in his own name.[2] A minor who has a curator grants a discharge with concurrence of the curator, a discharge by either the minor or the curator alone being null.[3] The general rule is that a minor who has no curator can validly act alone. But a distinction has been drawn between the granting of discharges of "large capital sums which fall to be invested, and income." [4] As regards the former a debtor is probably entitled to refuse to accept a discharge by the minor alone.[5] And even in the case of discharges for comparatively small sums paid to minors under a decree of Court, practice has not been uniform. In the case of *Jack* v. *North British Railway Co.*,[6] the Court held a discharge by minors alone to be sufficient; but in the earlier case of *Anderson* v. *Muirhead*,[7] the appointment of a *curator bonis* was held to be necessary; and in *Sharp* v. *Pathhead Spinning Co.*[8] and *Spring* v. *Blackall*,[9] a sum of damages was directed to be paid to a person named by the Court to be held in trust for the minor. This last course is now usually followed in practice. Married women have the same capacity to act alone in this as

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General Authorities.—Stair, i. 18, 2; Ersk. iii. 4; Bell's Prin., ss. 582–585.

[1] Bell's Prin., s. 582. [2] *Ibid.*, s. 2084; Fraser, Parent and Child, 3rd ed., p. 205.
[3] Bell's Prin., s. 2096; Fraser, Parent and Child, 3rd ed., p. 495.
[4] *Jack* v. *North British Rly. Co.*, 1886, 14 R. 263, per Lord Pres. Inglis at p. 265.
[5] *Kirkman* v. *Pym*, 1782, Mor. 8977. [6] 14 R. 263.
[7] 1884, 11 R. 870. [8] 1885, 12 R. 574. [9] 1901, 9 S.L.T. 162.

in other matters as if they were unmarried.[1] Trustees do not require special powers,[2] unless the granting of the discharge is at variance with the terms or purposes of the trust, in which case the Court may grant authority.[3]

Section 3.—Requisites and Proof of Discharge.

1305. The general rule regarding the extinction of a claim by payment is that it must be evidenced in the same way as that in which the claim was constituted—*unumquodque eodem modo solvitur quo colligatur*.[4] Where discharge is pleaded of a claim founded on a document of debt, proof of the discharge is limited to the writ or oath of the creditor,[5] even where the amount, payment of which is averred, is under £100 Scots.[6] And the rule applies to proof of payment of a sum due under a bill of exchange,[6] in spite of the provisions of s. 100 of the Bills of Exchange Act, 1882.[7] But where the defender avers that the claim has been extinguished otherwise than by payment, parole evidence may be competent.[8] Where the contract giving rise to the claim is constituted by parole, and payment is part of the *res gestæ*, as in the case of a sale for ready money, parole evidence is competent in proof of payment, but not where the sale was on credit.[9] Parole proof of payment in implement of a verbal obligation is competent in all cases where the amount does not exceed £100 Scots.[10]

1306. Where writ is requisite as evidence of discharge, it need not be probative. Where a discharge embodied in a probative writ is impugned, the disputed fact must be referred to the writ or oath of the creditor, unless the discharge is averred to have been obtained by fraud. The effect of an improbative receipt, on the other hand, may in certain cases be elided by parole evidence, even without averments of fraud,[11] the *onus* of proof being on the creditor averring non-payment. Thus it has been held competent to prove *prout de jure* that a receipt for rent, which was founded on by the defender in an action for payment, had been sent to him as a reminder that the rent was due, and not as an acknowledgment of payment;[12] and that a receipt by a minor with consent of her curators, in favour of her father's trustees, was granted merely in order to facilitate the settlement of estate duty.[13]

1307. A document which purports to discharge a claim should contain an express statement to that effect, but it will receive effect even in the

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[1] Married Women's Property (Scotland) Act, 1920 (10 & 11 Geo. V. c. 64), s. 3 (1).
[2] Trusts (Scotland) Act, 1921 (11 & 12 Geo. V. c. 58), s. 4 (*h*).
[3] *Ibid.*, s. 5.
[4] Ersk. iii. 4, 9; Bell's Prin., s. 564.
[5] *Thiem's Trs.* v. *Collie*, 1899, 1 F. 764; *Bishop* v. *Bryce*, 1910 S.C. 426; *Chrystal* v. *Chrystal*, 1900, 2 F. 373; Dickson, Evidence, s. 610.
[6] *Robertson* v. *Thomson*, 1900, 3 F. 5.
[7] 45 & 46 Vict. c. 61.
[8] *Bishop* v. *Bryce, supra*; *A. & A. Campbell* v. *Campbell's Exrs.*, 1910, 47 S.L.R. 837; 1910, 2 S.L.T. 240.
[9] Bell's Prin., s. 565; *Shaw* v. *Wright*, 1877, 5 R. 245; Dickson, Evidence, s. 616.
[10] Dickson, Evidence, s. 615.
[11] *Crawford* v. *Bennet*, 1827, 2 W. & S. 608.
[12] *Henry* v. *Miller*, 1884, 11 R. 713.
[13] *Smith* v. *Kerr*, 1869, 7 M. 863.

absence of such a statement if it is clear from its terms that the settlement of the claim is acknowledged; [1] and ambiguities in a document which is alleged to instruct a discharge may be explained by parole evidence.[2] In order to be admissible as evidence, a receipt requires to be stamped in accordance with the provisions of the Stamp Acts, and these apply to any document which is truly of the nature of a receipt, though not expressly bearing to be one.[3] Statutory forms for the discharge of a bond and disposition in security, and of a ground annual, are provided by the Conveyancing (Scotland) Act, 1924,[4] Schedule K, and for the discharge, on redemption, of casualties and additional feuduties, by the Feudal Casualties (Scotland), Act, 1914,[5] Schedules B and C.

Section 4.—Settled or Fitted Accounts.

1308. Where parties have had business dealings, and an account of receipts and disbursements has been rendered by one party and docqueted as correct by the other, without any express discharge, it is known as a settled or fitted account. Such a document does not constitute a discharge of all outstanding claims arising out of the transactions to which it relates, nor does it exclude proof of such claims. Its effect is to raise a presumption that all claims have been settled and to place the *onus* of proof upon the party averring the contrary.[6] The latter must specify the particular items in respect of which he challenges the account, and displace the presumption that it is correctly stated.[7]

1309. The doctrine of fitted accounts is not strictly applied as between agent and client, and acceptance by a client of a balance brought out in an agent's cash account, in which credit for a business account has been taken by the agent, does not preclude the client from subsequently insisting on taxation of the business account.[8] A current account in a bank pass-book is not a fitted account, and an entry therein, initialled by the bank officials, may be proved by parole to have been made in error.[9]

Section 5.—Pactum de non petendo.

1310. A *pactum de non petendo*, or agreement not to sue, if in absolute terms and in favour of a sole obligant, "importeth a renunciation of the right pursued on," [10] and is for practical purposes equivalent to a discharge. Where, however, there are co-obligants, a document granted by

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[1] *Niven* v. *Burgh of Ayr*, 1899, 1 F. 400.
[2] *Macvean* v. *Maclean*, 1873, 11 M. 506; *M'Adam* v. *Scott*, 1912, 50 S.L.R. 264; 1913, 1 S.L.T. 12.
[3] *Cameron* v. *Panton's Trs.*, 1891, 18 R. 728.
[4] 14 & 15 Geo. V. c. 27. [5] 4 & 5 Geo. V. c. 48.
[6] *Laing* v. *Laing*, 1862, 24 D. 1362; *Struthers* v. *Smith*, 1913 S.C. 1116.
[7] *Laing* v. *Laing*, *supra*, per Lord Justice-Clerk Inglis at p. 1366.
[8] *Cockburn* v. *Clark*, 1885, 12 R. 707; *M'Farlane* v. *M'Farlane's Trs.*, 1897, 24 R. 574, per Lord Moncreiff at p. 577.
[9] *Rhind* v. *Commercial Bank of Scotland*, 1857, 19 D. 519; revd. 1860, 3 Macq. 643.
[10] Stair, iv. 40, 31.

the creditor discharging one of them, while reserving his claim against the others, is generally to be construed, not as a discharge of all liability on the part of the debtor to whom it is granted, so as to extinguish his co-obligants' right of relief, but merely as an agreement on the part of the creditor to refrain from suing him.[1] But facts and circumstances may shew that the creditor has discharged all claims against one of the co-obligants whether on his own behalf or on those of the other co-obligants.[2] An agreement not to sue, if expressed in qualified terms, does not, of course, import a discharge. Thus, an agreement not to "take legal steps" against a debtor within seven years does not preclude the recovery of the debt by other means within that period.[3]

Section 6.—Apocha trium annorum.

1311. The discharge of three consecutive termly payments raises a presumption that all claims for preceding terms have been duly paid or renounced.[4] It appears that the presumption may be redargued by parole evidence.[5] In the case of *Hunter* v. *Lord Kinnaird's Trs.*,[6] Lord Corehouse gave effect to the presumption "in respect the respondents do not offer to prove the reverse by the writ or oath of the advocator," but Lord Kincairney in *Cameron* [7] and in *Stenhouse* [8] expressed the opinion that this decision was given on the special terms of the receipts, which were for "the balance of" the rent due at each term. The presumption arises from the reiteration of the discharges, and consequently less than three discharges, though covering three or more consecutive terms' payments, do not afford ground for the inference.[9] It has been held that two discharges by an ancestor and a third by his heir do not raise the presumption, unless the latter knew of the prior discharges.[10] It appears that three consecutive discharges granted by a factor or other administrator who has a general management of the creditor's affairs are not limited in their effect to claims arising during his period of office.[11] Where a bill has been granted,[12] or a decree obtained,[13] for arrears of payments, discharges for subsequent termly payments do not raise the presumption that the sums due under the bill or decree have been paid.

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[1] *Muir* v. *Crawford*, 1875, 2 R. (H.L.) 148; *Smith* v. *Ogilvie*, 1821, 1 S. 159; affd. 1825, 1 W. & S. 315.

[2] *Smith* v. *Harding*, 1877, 5 R. 147.

[3] *Thin & Sinclair* v. *Arrol & Sons*, 1896, 24 R. 198.

[4] Stair, iv. 40, 35; Ersk. iii. 4, 10; Bell's Prin., s. 567.

[5] *Cameron* v. *Panton's Trs.*, 1891, 18 R. 728, per Lord Kincairney at p. 729; *Stenhouse* v. *Stenhouse's Trs.*, 1899, 36 S.L.R. 637; 6 S.L.T. 368; *Duke of Buccleuch* v. *M'Turk*, 1845, 7 D. 927; Bell's Prin., s. 567; Dickson, Evidence, s. 184.

[6] 1829, 7 S. 548; see also Stair, i. 18, 2; iv. 40, 35; Ersk. iii. 4, 10.

[7] *Cameron* v. *Panton's Trs.*, 1891, *supra.*

[8] *Stenhouse* v. *Stenhouse Trs.*, *supra.*

[9] Stair, i. 18, 2; Ersk. iii. 4, 10; Dickson, Evidence, s. 177.

[10] *Gray* v. *Reid*, 1699, Mor. 11399; Ersk. iii. 4, 10.

[11] Dickson, Evidence, s. 180.

[12] *Patrick* v. *Watt*, 1859, 21 D. 637.

[13] *Grant* v. *Maclean*, 1757, Mor. 11402.

Section 7.—Construction and Effect of Discharge.

1312. A discharge granted in general terms and containing no enumeration of particular claims will in general receive effect as a discharge of all claims.[1] Thus a document granted by a woman in favour of the father of her illegitimate child, by which she bound herself to "take no action legal or otherwise against" him, was held to amount to a discharge of any claim of damages for seduction.[2] But a discharge, though expressed in general terms, will not cover claims of whose existence the granter was ignorant,[3] or claims of an extraordinary nature "which are not presumed to have fallen under the granter's notice," [4] such as the right of relief on payment of a cautionary obligation not exigible at the date of the discharge,[5] or an obligation of warrandice not yet incurred. A general discharge of all claims, following on an enumeration of particular claims, is limited in its scope to claims *ejusdem generis* with those enumerated.[6]

1313. A discharge by legatees, who were also heirs *ab intestato*, of all claims competent to them against trustees, has been held not to preclude a claim for repetition of a payment made in error by the trustee, from the party to whom it was made.[7] A discharge by a building society of a bond granted by one of the members was held not to cover an obligation under the rules of the society to pay 10 per cent. upon arrears of interest on the bond, the latter obligation not appearing *ex facie* of the bond.[8] Where joint tenants of a croft, one of whom had been sole tenant under a former lease, granted a discharge of all claims in respect of houses, it was considered doubtful whether the discharge covered claims arising under the former lease.[9] A renunciation of a lease implies a discharge of all claims by the tenant, unless these are expressly reserved.[10]

1314. A discharge in favour of one obligant, bearing to be granted in full satisfaction of a claim, precludes a further demand in respect of the same claim against a co-obligant. Thus a discharge granted by the pursuer of an action of damages against the directors of an institution for children, in respect of a payment made to him, which bore that the pursuer's "whole claims of every kind for damages in respect of the loss of the said children are hereby discharged," was held to exclude a second action of damages against the superintendent of the institution.[11] But a discharge, granted on payment of a composition, to one of several wrong-

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[1] Bell's Prin., s. 584.
[2] *M'Lean* v. *Hassard* (O.H.), 1903, 10 S.L.T. 593.
[3] Bell's Prin., s. 584; *Greenock Banking Co.* v. *Smith*, 1844, 6 D. 1340.
[4] Ersk. iii. 4, 9; Stair, i. 18, 2; Bell's Prin., s. 584.
[5] *M'Taggart* v. *Jeffrey*, 1830, 4 W. & S. 361; *Campbell* v. *Napier*, 1678, Mor. 5035; *Oliphant* v. *Newton*, 1682, Mor. 5035.
[6] Stair, iv. 40, 34; Ersk. iii. 4, 9; Bell's Prin., s. 583; *Marquis of Tweeddale* v. *Hume*, 1848, 10 D. 1053.
[7] *Armour* v. *Glasgow Royal Infirmary*, 1909 S.C. 916.
[8] *Galashiels Provident Building Society* v. *Newlands*, 1893, 20 R. 821.
[9] *Skinner* v. *Lord Saltoun*, 1886, 13 R. 823.
[10] *Lyons* v. *Anderson*, 1886, 13 R. 1020; *Waterson* v. *Stewart*, 1881, 9 R. 155.
[11] *Delaney* v. *Stirling*, 1893, 20 R. 506.

doers sued jointly and severally or severally, does not operate as a discharge of the others.[1]

1315. Where one of several co-obligants, liable jointly and severally, is discharged of all liability, his co-obligants are thereby freed of liability to the extent to which their right of relief is prejudiced.[2] But where each co-obligant is a principal debtor, not a cautioner, a discharge on composition granted to one does not generally debar the others from their right of relief against the one discharged, and accordingly does not operate as a discharge of their liability to the creditor, at all events where the latter's intention to preserve his claim is clear.[3] It is provided by s. 9 of the Mercantile Law Amendment Act, Scotland, 1856,[4] that where two or more parties are cautioners for a debtor, a discharge granted to one without the consent of the others shall be deemed to be a discharge to all. This provision applies only where the cautioners are liable jointly and severally for the whole debt. Thus where a debt of £105 was guaranteed by one cautioner to the extent of £70 and by another to the extent of £35, discharge of one cautioner was held not to release the other.[5] And there is an exception in the case of bankruptcy, where a discharge granted to the bankrupt does not have the effect of discharging co-obligants.[6]

Section 8.—Setting aside Discharge.

1316. A discharge may be reduced on the ground that it was granted under the influence of force and fear, or was impetrated by fraud. It has been held, however, that a debtor who states that he is impecunious, and offers part payment of his debt in return for a discharge in full, is under no duty to disclose his true financial position.[7] A discharge may also in certain cases be reduced on the ground of error. Thus a discharge which was granted *sine causa* under mutual error as to the extent of the right discharged has been held to be reducible, even though the error was one regarding a question of law.[8]

1317. In the case of *Dickson* v. *Halbert*[9] a distinction was drawn between payments made under the mistaken belief that they were due, and a discharge granted under the mistaken belief that all claims had been satisfied. In the latter case a mutual error in law was held to be a ground of reduction. Some doubt was expressed regarding this decision in the case of *Kippen* v. *Kippen's Tr.*,[10] in which it was held that a party who had granted a discharge of her claims against a trust estate for onerous causes, and after full deliberation and advice, was barred from

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[1] *Douglas* v. *Hogarth*, 1901, 4 F. 148.
[2] Ersk. iii. 3, 66; Bell's Prin., s. 260; *British Linen Co.* v. *Thomson*, 1853, 15 D. 314.
[3] *Morton's Trs.* v. *Robertson's Judicial Factor*, 1892, 20 R. 72.
[4] 19 & 20 Vict. c. 60.
[5] *Morgan* v. *Smart*, 1872, 10 M. 610.
[6] Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), s. 52.
[7] *Russell* v. *Farrell*, 1900, 2 F. 892.
[8] *Mercer* v. *Anstruther's Trs.*, 1871, 9 M. 618; affd. on other grounds, 1872, 10 M. (H.L.) 39; *Dickson* v. *Halbert*, 1854, 16 D. 586; *Purdon* v. *Rowat's Trs.*, 1856, 19 D. 206.
[9] 16 D. 586.
[10] 1874, 1 R. 1171.

reducing the discharge on averments that it had been granted in ignorance of her legal rights.

1318. The question of reduction of a discharge on the ground of error has frequently arisen in connection with claims for damages, and claims under the Workmen's Compensation Acts. The general rule is that a discharge granted by a party capable of understanding its meaning, and without misrepresentation by the other party, cannot be reduced on averments that its purport was not understood, or that it was granted for an inadequate consideration.[1] And a discharge granted by the pursuer of an action of damages, outwith the knowledge of his law-agent, and in ignorance of the fact that a tender of a larger sum than that in respect of which the discharge was granted had been made, has been held not to be reducible.[2] The rule will not in all cases apply where the granter of the discharge had not full opportunity to understand, and did not in fact understand, the consequences of his action.[3] A discharge granted in error, not merely as to its effect, but as to the actual *corpus* of the document signed, is reducible; on this ground an arbitrator was held entitled to set aside a discharge by a workman "of all claims" against employers, which the workman granting it believed to be merely a receipt for past due compensation.[4]

1319. The Workmen's Compensation Act, 1925,[5] provides by ss. 23 and 25 that a sheriff-clerk may refuse on various grounds, including the inadequacy of the sum paid to the workman, to register an agreement by which a workman discharges his claim to compensation in return for a lump sum payment. These provisions are designed to protect a workman from the results of an improvident discharge of his claim. And an agreement by a workman, discharging his claim in return for a lump sum payment, which is not an agreement for the redemption of a weekly payment in accordance with the provisions of the Acts, is void.[6]

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[1] *North British Rly. Co.* v. *Wood*, 1891, 18 R. (H.L.) 27; *Mackie* v. *Strachan, Kinmond & Co.*, 1896, 23 R. 1030; *Mathieson* v. *Hawthorns & Co.*, 1899, 1 F. 468; *Dornan* v. *Allan & Son*, 1900, 3 F. 112; *M'Guire* v. *Paterson & Co.*, 1913 S.C. 400; *Park* v. *Anderson Brothers*, 1924 S.C. 1017.

[2] *Welsh* v. *Cousin*, 1899, 2 F. 277.

[3] *M'Donagh* v. *Maclellan*, 1886, 13 R. 1000; *Macandrew* v. *Gilhooley*, 1911 S.C. 448.

[4] *Ellis* v. *Lochgelly Iron & Coal Co.*, 1909 S.C. 1278.

[5] 15 & 16 Geo. V. c. 84.

[6] *Russell* v. *Rudd*, [1923] A.C. 309.

DISCHARGE IN BANKRUPTCY.

See SEQUESTRATION; TRUST DEED FOR CREDITORS.

DISCHARGE OF TRUSTEES.

See TRUSTEES.

DISCLAMATION.

See PRACTICE AND PROCEDURE.

DISCLAMATION, CASUALTY OF.

See CASUALTIES OF SUPERIORITY.

DISCUSSION.

See CAUTIONARY OBLIGATIONS.

DISEASES OF ANIMALS ACTS.

See ANIMALS.

DISENTAIL.

See ENTAIL.

DISJOINING ACTIONS.

See PRACTICE AND PROCEDURE.

DISJUNCTION AND ANNEXATION.

DISJUNCTION AND ERECTION.

See CHURCH.

DISMISSAL.

See DECREE; PRACTICE AND PROCEDURE.

DISMISSAL FROM HIS MAJESTY'S FORCES.

See ARMED FORCES OF THE CROWN.

DISMISSAL FROM SERVICE.

See HIRING; MASTER AND SERVANT.

DISORDERLY HOUSE.

See CRIME.

DISPARAGEMENT.

See CASUALTIES OF SUPERIORITY.

DISPENSATION, CLAUSE OF.

See UNION, CLAUSE OF.

DISPOSITION.

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Introduction.

1320. The word "disposition" cannot be said to be a technical term in Scots Law. It is not an appropriate name for any deed of conveyance which does not contain the word "dispone." But on the one hand it has always been, and still is, used of a deed which is restricted

to conveying corporeal moveables, and, on the other hand, the word "dispone" has been unnecessary in wills of heritage since 1868 and in *inter vivos* conveyances of heritage since 1874. Then, confining attention to heritage, it is not, and strictly never has been, correct to say that a disposition is a conveyance by a proprietor who is himself infeft; and that it was or is properly applicable only to a deed of that nature. The customary form of transmission of an unrecorded conveyance has always been a disposition of the land and an assignation of the unexecuted executive clauses, and it has usually been known as a disposition and assignation. Finally, under the Conveyancing Act, 1924,[1] an uninfeft owner can grant a "disposition" which is itself a warrant for direct infeftment by simply recording it. Accordingly this article is not restricted to conveyances by infeft proprietors.

1321. In order to avoid repetition, reference is made to the article CHARTER (FEUDAL),[2] in general supplement of what is contained in this article. The exposition in the former article enables various aspects of the subject either to be wholly omitted from or to be treated very briefly in this article. This applies to the following matters:—Building Conditions (*q.v.*); Clauses of Direction; Consenters; Descriptions by boundaries, by general name, or by reference; the controlling nature of the Dispositive Clause; the term of Entry; Minerals (*q.v.*); Pertinents (*q.v.*); Reference to Conditions, etc.; Reservations.

SECTION 1.—DEVELOPMENTS SINCE 1847.

SUBSECTION (1).—*Between* 1847 *and* 1858.

1322. It may be useful to sketch briefly the historical development of the ordinary disposition from 1847 to date. Before 1858 the clauses were: (1) the inductive clause, containing the names and designations of the parties, or at least those of the granter or granters and any consenters, and also the cause of granting, and a receipt for the price, if any; (2) the dispositive clause, containing words of conveyance, of which "dispone" was always one; the name of the disponee and his designation if not already given; the description of the property; and all burdens and conditions, whether already created and here repeated, or which are being created for the first time; (3) the term of entry; (4) the obligation to infeft *a me de superiore meo* or *a me vel de me*; (5) the procuratory of resignation; (6) the assignation of writs; (7) the assignation of rents; (8) the obligation to relieve of feu-duty, casualties, and public burdens up to the date of entry; (9) the clause of warrandice; (10) the consent to registration; (11) the precept of sasine; and (12) the testing clause.

SUBSECTION (2).—*Since* 1858.

1323. The successive changes have been as follows: By the Titles to Land Act, 1858[3]—(1) the obligation to infeft was superseded by a

[1] 14 & 15 Geo. V. c. 27, s. 3. [2] *Ante*, Vol. III. p. 235. [3] 21 & 22 Vict. c. 76.

statement of the manner of holding, and (2) the precept of sasine was rendered unnecessary, the reason being that direct recording came in lieu of infeftment and instrument of sasine. By the Titles to Land Act, 1860,[1] the statement of the manner of holding became unnecessary, the reason being that the statutory implication in that respect then became satisfactory. By the Conveyancing Act, 1874,[2] the procuratory became unnecessary and was in effect prohibited, for, even if inserted, it could not be used. The 1924 Act has made no change on the form of the ordinary disposition. This summary record of the changing forms must be read along with the statutory facilities, introduced from 1858 onwards, for abbreviation of descriptions of the property and of references to burdens and conditions, all of which are fully treated in the article CHARTER (FEUDAL).

SUBSECTION (3).—*Obligation to Infeft.*

1324. It seems proper also to retain in this article the main part of what here appeared in previous editions in regard to the obligation to infeft and the procuratory or clause of resignation. In what may for present purposes be called the original form of the obligation to infeft the disponee, the disponer obliged himself to infeft the disponee by two manners of holding, "one thereof to be holden of me and my foresaids in free blench, for payment of a penny Scots in name of blench-farm, at Whitsunday yearly, upon the ground of the said lands, if asked only, and freeing and relieving us of all feu-duties and other duties and services exigible out of the said lands and others by our superiors thereof." This part of the obligation to infeft was called the *de me* holding, and, as will be observed, it stipulates for a blench-duty to the disponer, and "in every part evinces its purpose as merely elusory, in order to effectuate a subordinate holding without creating any substantial estate of superiority in the disponer."[3] But in addition to granting to his disponee a *de me* holding, the disponer granted him an *a me* holding, thus expressed in the clause of obligation to infeft: "and the other"—that is, the other holding—"of the said infeftments to be holden from me and my foresaids of and under our said superiors, in the same manner that I, my predecessors and authors, held, hold, or might have holden the same, and that either by resignation or confirmation, or both, the one without prejudice of the other."

SUBSECTION (4).—*The Alternative Holding.*

1325. The holding *a me vel de me*, as it came to be called, had its origin in a device to evade the rule that a vassal could not, *invito superiore*, voluntarily alienate his lands so as to substitute a new vassal in his place. Prior to the seventeenth century, where the object of a seller and a purchaser was not to create in perpetuity the relationship

[1] 23 & 24 Vict. c. 143. [2] 37 & 38 Vict. c. 94. [3] Menzies, Conv., p. 641.

of superior and vassal between them, but to give at once security of title to the purchaser, with power to him to substitute himself sooner or later in the seller's place, the seller granted two separate deeds to the purchaser. Of these two deeds, the one was called a charter *de me*, because it bore that the lands were disponed to be held of the seller, *i.e. de me*; and the other was called a charter *a me*, because it bore that the lands were disponed to be held of the seller's superior, *i.e. a me*, or, more fully, *a me de superiore meo*. On obtaining these two deeds, the seller expede and recorded an instrument of sasine, the form of which was such that it could be referred either to the holding *de me* in the one deed or to the holding *a me* in the other; and the infeftment thus taken gave him, until it was confirmed by the superior, a title to the lands, which was valid against the seller and his subsequent disponees as well as his creditors, but created a mid-superiority in his favour. In other words, the infeftment, until confirmed, was ascribed to the *de me* holding, and the result was this: (*a*) a real right to the lands was vested in the purchaser; (*b*) a fee of mid-superiority was created in favour of the seller; (*c*) the seller remained the vassal of his own superior, and liable to him for the prestations of the feu; and (*d*) the purchaser's superior was the seller, the purchaser, however, being liable to relieve the seller of the annual prestations exacted from the seller by his superior. But the infeftment, when confirmed by the seller's superior, completely divested the seller of everything, and placed the purchaser in his room as vassal in the lands; and, after confirmation, the infeftment was ascribed to the *a me* holding, and the deed with the *de me* holding was dropped from the progress of titles. The confirmation of the infeftment had accordingly these effects: (*a*) to extinguish the mid-superiority in the seller created by the infeftment *de me*, and so to extinguish the relationship of superior and vassal which had subsisted between the seller and the purchaser; (*b*) to extinguish the relationship of superior and vassal between the superior of the seller and the seller, and thereby to end the seller's liability for implement of the prestations of the feu; and (*c*) to substitute the relationship of superior and vassal between the seller's superior and the purchaser in lieu of that relationship which had subsisted between the superior and the seller, and, as a consequence, to make the purchaser liable to the superior in implement of the prestations of the feu.

1326. The separate charters *de me* and *a me*, granted by a disponer to a disponee, gave place, at least as early as the beginning of the seventeenth century, to one deed—the disposition with an alternative manner of holding, *a me vel de me*, with a precept of sasine applicable to either holding. The infeftment on such a disposition, until it was confirmed by the superior, gave the disponee a valid title to the lands, with the disponer as his immediate superior; and, when confirmed, substituted the disponee as a vassal in room of the disponer. The infeftment, until confirmed, had the same effect as regards the disponee and the disponer as infeftment on the deed with the *de me* holding

formerly had; and, when confirmed, operated in the same way as regards the disponer and the disponee as the confirmation of the superior did when two charters, the one *de me* and the other *a me*, had been used. The infeftment on the indefinite precept of sasine was termed base until confirmed, and public when confirmed;[1] and, after confirmation, the disponee was not entitled to impute his infeftment to other than the *a me* holding.[2]

1327. The clause of obligation to infeft by two separate manners of holding, *de me* and *a me*, continued in use until the commencement of the Lands Transference Act, 1847.[3] That Act introduced a short form, thus: "And I oblige myself to infeft the said [*disponee*] and his foresaids, to be holden *a me* (*or* de me *or* a me vel de me, *as the case may be*]." The Act provided that this new clause should import what the older form had expressed.

1328. The Titles to Land Act, 1858,[4] rendered it unnecessary to insert in any conveyance a clause of obligation to infeft, and declared that if land should be disponed to be held *a me* only, or *a me vel de me*, the clause so expressing the manner of holding should imply that the lands were to be held in the manner expressed in the Lands Transference Act, 1847, with reference to obligations to infeft *a me* or *a me vel de me* respectively (s. 5). The Act of 1858 also declared that where no holding was expressed, the conveyance should be held to imply that the lands were "to be holden in the same manner in which the granter of the conveyance held or might have held the same" (s. 5); but the Titles to Land Act, 1860,[5] declared that the words just quoted should be construed to mean that the lands were to be held *a me vel de me* where the investiture of lands contained no prohibition against subinfeudation, or against an alternative holding, and *a me* only where the investiture contained such prohibition, and provided that, where the investiture contained such prohibition, the conveyance or instrument should, if an entry in the lands therein specified or thereby conveyed was expede with the superior within twelve months from the date of such conveyance or instrument, have the same preference in all respects from the date of recording in the register of sasines the conveyance or instrument as if the same contained an *a me vel de me* holding, and the investiture did not contain any prohibition against subinfeudation, or against an alternative holding (s. 36).

1329. Repealing the Acts of 1847, 1858, and 1860, the Titles to Land Act, 1868,[6] re-enacted the provision in the Act of 1858 that it should not be necessary to insert in any conveyance an obligation to infeft (s. 5), and gave a form of the clause expressing the manner of holding. This clause, which was introduced into the disposition immediately

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[1] *Bishop of Aberdeen* v. *Viscount Kenmure*, 1680, Mor. 3011, 3012; 2 Ross's L.C. 1; *Bellenden* v. *Ker's Trs.*, 1825, 2 Ross's L.C. 2; *Bothwell* v. *Deans*, 1687, 2 Ross's L.C. 15.

[2] *Lord Chancellor* v. *Brown*, 1688, Mor. 3012; *Bothwell*, *supra*, and Mor. 3012.

[3] 10 & 11 Vict. c. 48.

[4] 21 & 22 Vict. c. 76.

[5] 23 & 24 Vict. c. 143.

[6] 31 & 32 Vict. c. 101.

after the clause declaring the term of entry, ran thus: "To be holden the said lands and others [*or* subjects] *a me* [*or* a me vel de me, *as the case may be*]" (s. 5, Sched. (B) No. 1).

1330. The following points are worthy of note in connection with the clause of obligation to infeft and manner of holding: (1) Prior to the Titles to Land Act, 1858, an *a me* holding only was implied in a disposition containing no holding.[1] A *de me* holding had to be expressed, and was not inferred from an obligation, *e.g.* to infeft the disponee "by two infeftments and manners of holding, and that either by resignation or confirmation, or both, the one without prejudice to the other";[2] and if a disposition specified one manner of holding only, the indefinite precept was construed as directing infeftment to be given so as to constitute that holding and no other.[3] (2) Infeftment in virtue of a disposition with an *a me* holding, express or implied, did not, until followed by confirmation, divest the disponer or invest the disponee, *i.e.* such infeftment, without confirmation, was, before 1858, null.[4] (3) After the Titles to Land Act, 1860, till the commencement of the Conveyancing Act, 1874, when a disposition contained no manner of holding, an *a me vel de me* holding was implied in cases in which the titles of the lands contained no prohibition against subinfeudation or against an alternative holding; but an *a me* holding only was implied in cases in which the titles contained such prohibitions, or either of them, the conveyance in this case, however, having the same preference in all respects from the date of infeftment thereon as if the conveyance contained a clause expressing the manner of holding to be *a me vel de me*, and the titles did not contain any prohibition against subinfeudation or against an alternative holding, in the event of an entry in the lands being expede with the superior within twelve months from the date of the conveyance.[5] Notwithstanding this provision regarding the effect of entry within twelve months from the date of a conveyance, the law seems to have been that if a second conveyance was granted of the same lands to a *bona fide* third party, who obtained entry before the holder of the first conveyance, the first disponee could not, even within the twelve months, expede an entry at all, because the entry of the second disponee completely divested the disponer.[6] (4) An alternative holding, not being designed to create a permanent base right, was not deemed a contravention of a prohibition against subinfeudation.[7] (5) When a purchaser did not stipulate for an alternative holding, the seller was not bound to give it; for the seller was bound to grant only such a disposition as would enable the purchaser to take his (the seller's) place under his superior.[8] (6) While a holding

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[1] *Buchan* v. *Jamieson*, 1678, Mor. 2258; *Peebles* v. *Watson*, 1825, 4 S. 290.
[2] *Peebles, supra.*
[3] *Rowand* v. *Campbells*, 1824, 3 S. 196.
[4] *Rowand, supra*; *Peebles, supra*; Menzies, p. 629.
[5] 31 & 32 Vict. c. 101, s. 6.
[6] Bell, Convey. i. 688.
[7] *Colquhoun* v. *Walker*, 1867, 5 M. 773; *Inglis* v. *Wilson*, 1909 S.C. 1393.
[8] *Miller* v. *Young*, 1843, 6 D. 149.

de me is still inserted in a feu-right, no expression of the manner of holding has been necessary in a disposition since the commencement of the Conveyancing Act, 1874.[1]

Subsection (5).—*Procuratory or Clause of Resignation.*

1331. The procuratory of resignation was a mandate by the disponer (sometimes called the resigner) authorising the giving back of the lands to the superior, in order that he might reconvey them to the disponee (sometimes called the resignatary), to be held of the superior as the disponer himself held them. This was also the import of the clause of resignation which, after 1847, superseded the procuratory of resignation. The procuratory of resignation *in favorem* is not to be confounded with the procuratory of resignation *ad remanentiam*, which was inserted in, *inter alia*, a disposition of property in favour of the superior by his vassal, and authorised the surrender of the lands into the hands of the superior in order that they might remain with him. The procuratory of resignation *in favorem*, as the style of the disposition in use before 1847 shews, authorised procurators to surrender the lands to the superior or his commissioners for "new infeftment," *i.e.* infeftment in favour of the disponee under the disposition containing the procuratory; whereas the procuratory of resignation *ad remanentiam* authorised procurators to surrender the lands to the superior or his commissioners "as in his own hands and for his behoof *ad perpetuam remanentiam*, to the effect that the right of property which stood in my"—*i.e.* the vassal's—"person may be established and consolidated in the person of the said B."—*i.e.* the superior—"with his right of superiority of the same, and remain inseparable therefrom in all time coming."

1332. The form of the procuratory of resignation *in favorem* having been given, its history may now be stated. The Lands Transference Act, 1847, made it unnecessary to use the old form. This Act introduced a clause of resignation in these terms: "And I resign the said lands and others for new infeftment" (s. 1, and Sched. (A)), and declared that such a clause, in a conveyance by a vassal to a stranger, should be equivalent to a procuratory of resignation in the terms then in use, and that, if inserted in a conveyance by a vassal to his superior, it should be equivalent to a procuratory of resignation *ad remanentiam*.[2] It being found inconvenient to have a clause of resignation which fell to be read as a clause of resignation either *in favorem* or *ad remanentiam*, according to the nature of the disposition, the Titles to Land Act, 1858, enacted that a clause of resignation in any conveyance should be held to import a resignation *in favorem* only unless expressed to be a resignation *ad remanentiam*.[3] This Act, however, provided, in order to avoid inconvenience in cases where a clause of resignation in

[1] 1st October, 1874; 37 & 38 Vict. c. 94, s. 2.
[2] 10 & 11 Vict. c. 48, s. 3.
[3] 21 & 22 Vict. c. 76, s. 5.

the form introduced by the Act of 1847 had been inserted in conveyances in favour of superiors, that nothing contained in the Act should prevent an instrument of resignation *ad remanentiam* from being expede, and recorded on a conveyance theretofore granted, containing a clause of resignation in the form authorised by the Act of 1847 (s. 5). Repealing the Lands Transference Act, 1847, and the Titles to Land Act, 1858, the Titles to Land Consolidation Act, 1868, enacted that in any conveyance of lands not held by burgage tenure in which a procuratory or clause of resignation was necessarily or usually inserted, it should be competent to insert a clause in this form: "And I resign the said lands and others [*or* subjects] for new infeftment or investiture" (s. 5, and Sched. (B), No. 1), and declared that a clause for resigning lands in this form should be equivalent to a procuratory of resignation *in favorem* only in the terms in use prior to the 30th September 1847, unless expressed to be a resignation *ad remanentiam*, in which case it should be equivalent to a procuratory of resignation *ad remanentiam* according to the form in use prior to that date.[1]

1333. In connection with the procuratory and the clause of resignation *in favorem*, these points should be kept in view: (1) They were impliedly abolished by the Conveyancing Act, 1874, which renders incompetent the granting of charters or writs of resignation; but prior to 1847 a procuratory of resignation *in favorem*, and, after 1847, till the commencement of the Conveyancing Act, 1874, either a procuratory or a clause of resignation *in favorem* was an essential in a disposition when the disponee desired to enter by resignation; (2) although at common law both procuratories of resignation and precepts of sasine fell by the death of either granter or grantee, the Statute 1693, c. 35, provided that procuratories of resignation, as well as precepts of sasine, might be executed after the death of the parties in whose favour they were made, on condition that instruments of resignation and sasine taken after the death of either party expressed the titles of those in whose favour the resignation was made and to whom the sasine was granted, and that the same were deduced therein; and the Infeftment Act of 1845,[2] which abolished instruments of resignation *in favorem*, provided that the deduction should be made in the charter of resignation; and (3) a procuratory or clause of resignation *in favorem* granted by a person base infeft was not a valid warrant for resignation until his base infeftment was expressly or constructively made public by his superior.

Section 2.—The Modern Disposition.

1334. The form of disposition now in use is regulated by the provisions of the Titles to Land Consolidation Act, 1868,[3] as amended by the provisions of the Conveyancing Acts, 1874 and 1924. The principal provisions of the Act of 1874, so far as they relate to the disposition, are the

[1] 31 & 32 Vict. c. 101, s. 8. [2] 8 & 9 Vict. c. 35, s. 9. [3] 31 & 32 Vict. c. 101.

following: (1) It is incompetent to object to the validity of any conveyance of heritage coming into operation after the passing of the Act (7th August 1874), on the ground that it does not contain the word "dispone," provided it contains any other word or words importing conveyance or transference or present intention to convey or transfer (s. 27, and see s. 20 of the 1868 Act, as to use of *de præsenti* words of conveyance in *mortis causa* deeds). (2) It repealed s. 11 of the Act of 1868 (which related to descriptions of lands by reference), and provided a new form of reference, which has been repealed and replaced by a somewhat simplified form by section 8 of the 1924 Act. (3) According to the Act of 1874, reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations affecting lands may be effectually imported into any deed relating to such lands by reference to a deed applicable to such lands, or to the estate of which such lands form a part, recorded in the appropriate register of sasines, and in which such reservations, real burdens, etc., are set forth at full length, a reference in the form set forth in Schedule (H) of the Act or in a similar form being sufficient. The Act also makes it lawful for any proprietor of lands to execute a deed setting forth the reservations, etc., under which he is to feu or otherwise deal with his lands or any part thereof, and to record the same in the appropriate register of sasines, and, on the deed being recorded, the reservations, etc., may be effectually imported into any deed or conveyance relating to such lands subsequently granted by the proprietor or by any other person, provided it is expressly stated in such deed or conveyance that it is granted under the reservations, etc., set forth in the deed containing them *ad longum* (s. 32; and see also s. 10 of the 1868 Act). (4) Where no term of entry is stated in a conveyance of lands, the entry is declared, by the Act of 1874, to be at the first term of Whitsunday or Martinmas after the date or last date of the conveyance, unless it appears from the terms of the conveyance that another term of entry was intended (s. 28). (5) The Act of 1874 also provides that it shall be no objection to the probative character of a deed, whether relating to land or not, that the writer or printer is not named or designed, or that the number of pages is not specified, or that the witnesses are not named or designed in the body of the deed or in the testing clause thereof, provided that, where the witnesses are not so named and designed, their designation shall be appended to or follow their subscriptions, and that the designations may be so added at any time before the deed has been recorded in any register for preservation or founded on in any Court, and need not be written by the witnesses themselves.

Section 3.—The Modern Clauses.

1335. The ordinary standard clauses of the modern disposition will now be reviewed with a practical tendency, a reference by the reader to the article Charter (Feudal) being always assumed.

SUBSECTION (1).—*Narrative or Inductive Clause.*

(i) *Capacity.*

1336. A number of matters of considerable practical importance may appropriately be dealt with under this clause. First, as to the capacity of the parties,[1] there is the controlling consideration that the alienation of immoveable property is an exception to the general rule that personal capacity is regulated by domicile. The *lex situs* rules.[2] In like manner our Courts will usually appoint a special guardian to minors and other persons without full, or with no, capacity, instead of granting power to an existing guardian acting under foreign law.[3]

(ii) *Designations.*

1337. If the granters are numerous it is a convenient form, and tends to clearness, to let the deed run—"We the parties following, namely (first)," and so on. If they are trustees it is suggested that it is sufficient to say, after the names and designations, "the testamentary trustees" (or "the surviving original and assumed testamentary trustees") of A. B. (*designed*) without any reference to the will or trust deed or deeds of assumption. It may in the case of trustees be considered an advantage to say expressly: "and as such possessing express power of sale." When the sale has been by auction, and unless it is a sale under a bond or by an *ex facie* absolute disponee, there is no necessity to refer to the auction at all, and certainly none to specify the Articles of Roup or to give any dates. The words "heritable proprietor" are always superfluous. The receipt of the price being acknowledged, there is nothing added by purporting to give a discharge of the same price. In the designations such expressions as "presently residing at," when what is meant is "at present residing at," and "widow of the late" ought always to be avoided.

(iii) *Consenters.*

1338. The effect of consents is dealt with under CHARTER (FEUDAL), and certainly there are many cases in which consideration should be given to the terms in which the consent is to be expressed, and also as to warrandice in the same relation. The application of the rules as to consents is in practice considerably interfered with by the custom of so framing the disposition that, after the consents have been expressed, the deed resumes "and we all with joint consents and assent," which may have the result of obliterating all distinction between principal granters and consenters. A consideration which makes the

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[1] See para. 1383 *et seq., infra.*

[2] *Bank of Africa* v. *Cohen*, [1909] 2 Ch. 129; *cf.* Married Women's Property (Scotland) Act, 1920, s. 7.

[3] *Collins*, 1921, 2 S.L.T. 36; *M'Fadzean*, 1917 S.C. 142; *Ogilvie* v. *Ogilvie's Trs.*, 1927, S.L.T. 83.

conveyancer now lean to the method of incorporated consents is the high recording dues at the register of sasines. If a property is being sold for £15,000, and at the same time a bond for £10,000 is being paid off by the vendor, a substantial saving is effected if the whole be done in one deed, for then the *ad valorem* recording dues are charged on the £15,000 only.

Subsection (2).—*Dispositive Clause.*

(i) *Destination.*

1339. It is usual to add a reference to the disponee's "heirs and assignees whomsoever," but these words add nothing, and their omission is suggested by their absence from Schedule C to the 1924 Act. When there are two or more disponees the matter of survivorship arises.[1] Generally, it is advised that the creation of special destinations, with references to conjunct fee and liferent, powers of disposal, and similar specialties, should be avoided. The parties usually do not understand them, and they frequently lead to disputes and litigation. If purposes of that kind are in view, it is better to create a trust, with particular trust purposes in various formulated "events." In any case it will be remembered that without a continuing trust an alimentary liferent cannot be created.[2]

(ii) *Plans.*

1340. The first statutory provision in the conveyancing code regarding plans is contained in s. 48 of the 1924 Act. It is thereby at last enacted that, when a plan is signed as relative to a deed, it may be recorded in the general register of sasines along with that deed. It is not said that the plan must be annexed to the deed; nor that the warrant of registration need make any reference to the plan; nor that anything need be written on the plan except the signatures of the parties; nor that the signing of the plan need be referred to in the testing clause of the deed. It is necessary that there should be also a duplicate plan which must be docqueted with reference to the deed, authenticated in the same manner as the principal plan, and sent to the register along with the deed. The duplicate plan is retained in the register; the ingiving of it is noted in the register; and an acknowledgment of the receipt of it is marked on the principal plan; which requirement shews that the principal plan, if not annexed to the deed, must be sent to the register with the deed. It is suggested that the testing clause, if any, should contain such words as "together with the plan hereto annexed and docqueted and signed with reference hereto"; that the principal plan should bear a docquet "with reference to the foregoing disposition by A. in favour of B., dated ," and should be signed but not attested; and that the duplicate plan should bear a docquet as follows: "This is a duplicate of the plan referred to in, and

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[1] See para. 1427 *et seq.*, *infra*. [2] *Forbes Trs.* v. *Tennant*, 1926 S.C. 294.

annexed and signed as relative to, the disposition by A. in favour of B., dated ." These new statutory provisions are valuable; among other things they guard against the serious risk of the loss of a plan which may be essential to the title.[1]

(iii) *Pertinents.*

1341. This subject is treated more fully in the article CHARTER (FEUDAL), but it may be useful to mention certain points which frequently arise in ordinary transactions and attention to which is important. Thus (1) as regards servitudes, if the property disponed is the dominant tenement it is desirable to mention the servitude expressly in the dispositive clause; if it is the servient tenement, the vendor may be advised to have the servitude referred to, though perhaps an exception from the warrandice may suffice, but as to that, see the case cited below.[2] (2) An express assignation may be necessary of claims of damages for injury done to the property, whether before the contract of sale or after it, but before entry.[3] But indeed this raises the further question of the incidence of loss between vendor and purchaser in relation both to cases of fault and to cases of accident, which it is certainly very important to adjust before settlement of the price. (3) Fittings should be dealt with carefully in the framing of missives. The following are suggested for consideration from an actual case of a villa with garden: grates, hearths, and fenders; blinds; gas and electric light and power fittings, including pendants and shades; mantels and overmantels; shelving; curtain- and picture-rods; linoleum and waxcloth; meat-safe; and in the garden—sheds and frames; plants, flowers, and vegetables; manure; garden seats; and garden roller.

(iv) *Exceptions.*

1342. Exceptions, if any, from the property conveyed must necessarily be inserted in the dispositive clause. It may sound, but experience proves that it is not, unnecessary to give a warning against a serious phase of ambiguity, namely, the insertion of part of the description in such an awkward manner as to leave it doubtful whether the part in question is a continuation and extension of an exception, or is, on the contrary, a further grant. It occurs thus: "I dispone X. excepting Y. as also Z." In such a case it is left in doubt whether Z. is a further grant or is a further exception. In England this is sometimes avoided by inserting after "as also" such words as "and that by way of further grant and not of further exception." But there are other methods of description equally clear, *e.g.* "(first) X. excepting Y. and (second) Z."; or "Z. as also X. excepting Y."

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[1] *Maclachlan* v. *Bowie*, 1887, 25 S.L.R. 734.
[2] *North British Rly. Co.* v. *Edinburgh Mags.*, 1893, 20 R. 725.
[3] *Burrell* v. *Simpson*, 1876, 4 R. 177; *M'Bride* v. *Caledonian Rly. Co.*, 1894, 21 R. 620.

(v) *New Burdens.*

1343. As regards burdens intended to be real in their nature, and which are being created in the disposition for the first time, one essential condition is that they shall be contained in the dispositive clause.[1] The condition is absolute, though difficult to explain or justify. The rule is satisfied if the creation of the burden comes immediately after the description of the property and exceptions, if any, and after any reference to already existing burdens. But it would be fatal to the quality of the new burden as real if there intervened before it, say, the term of entry or the appointment of an executor. Greater caution might suggest that it would be still better to frame the deed so that the order is: (1) description; (2) exceptions, if any; (3) the creation of the new burden; and (4) the reference to already existing burdens.

(vi) *Reference to Existing Burdens.*

1344. Until recently this has often occasioned much trouble owing to omissions and errors. Upon this, three things are to be said. First, any fear of objection by third parties, *e.g.* the superior or a ground-annual creditor, may, and always might, be dismissed unless the direction to refer is fenced with irritant or resolutive clauses. Second, even if the direction is so fenced, no purchaser need now trouble himself regarding any omission or defect in the title produced to him, for all he has to do is to see that the disposition in his own favour is made to contain a proper reference and no possibility of challenge remains (1924 Act, s. 9). Third, the vendor may desire that, in his own interest, and wholly irrespective of the position of any third party, various matters should be set out on the face of the disposition, so that it may clearly appear that he has disclosed the whole position to the purchaser, particularly with reference to his own (the vendor's) warrandice. This is the explanation of so many references in dispositions to memoranda of commutation of feu-duty or ground-annual. It is suggested that it is undesirable that these references should become general and be perpetuated; also that it is unnecessary, especially if there is an inventory of writs annexed, one item of which is the recorded memorandum of commutation.

(vii) *Apportionment of Common Charges.*

1345. There may be cases in which the apportionment or incidence of existing charges common both to the property which is being sold and to other property may be adequately dealt with in the obligation to relieve, occurring later in the deed, but undoubtedly the proper place for matters of that nature is the dispositive clause. Commonly such arrangements are to operate only among part-owners of a feu, but without binding the superior. It may, however, be that the disponer

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[1] Bell's Prin., s. 920; Lord Shand in *Cowie* v. *Muirden*, 1893, 20 R. (H.L.) 81.

has power to allocate even as against the superior, in which case the agreement imported into the disposition will bear to be in exercise of that power and will bind the superior accordingly. But, whether the agreement be of the one nature or the other, it ought to be found in the dispositive clause. In many instances its appropriateness there as matter of draughtsmanship is obvious, apart from any application of the technical rule that real burdens must be found in that clause. Thus in the case of allocation of feu-duty, whether *inter se*, or *quoad omnes*, there is probably in any case in that clause a declaration that the disposition is granted under the burdens contained in the feu-charter, at which point it is convenient to proceed to set out the rule of payment of the feu-duty as agreed between the parties, whether the intention be that the part sold shall remain burdened with an aliquot share, or that the part retained shall bear the whole, to the entire relief of the other part. The 1924 Act (s. 40) provides for this in the case of a sale by a bondholder, and it is there apparently enacted or assumed that in such matters a real burden can be created for an unspecified or fluctuating sum or for a proportion, say one-half, thereof. If, say, the intention is to put the whole of a common charge on lot A to the relief of lot B (*inter se*), and if B only is sold, it is not quite clear how the scheme of the section is to be carried out. Again, the section provides not only for a real burden, but also for personal liability of relief upon the successive proprietors of the burdened part in all time coming, but each only for the period of his ownership, which is a novelty; and it will not be assumed that the same thing can be done except exactly in terms of the section, namely, by a selling bondholder, or even by him except as regards the items mentioned in the section.[1]

1346. Other specialties which are to be kept in view are (1) if the items are already *debita fundi* on the whole, *e.g.* feu-duty, the real burden is complete without any new creation, and the ordinary clause of apportionment or incidence, according to previous use and wont, is enough; (2) in the case of casualties, special consideration will be required if the liability is untaxed or dependent on death; (3) as the section states, third parties, *i.e.* the superior, are not affected, unless the proprietor has power of allocation effectual against the superior, in which case it is understood that the section enables the selling bondholder to exercise the power.

1347. The items mentioned in s. 40 of the 1924 Act are (1) feu-duty, (2) casualties, (3) ground-annual, (4) stipend, (5) valued rent—not strictly a burden, (6) land tax; but in addition there may be (7) sums in lieu of carriages and services, (8) multures or sums in lieu thereof, (9) teind duty, (10) "standard charge" under the Church of Scotland Act, 1925,[2] (11) redemption instalments for extinction of that annual charge where not exceeding £1—under s. 14 of the same, (12) annual rent for *quoad sacra* churches under s. 35 of that Act,

[1] *Johnston* v. *Irons*, 1909 S.C. 305.

[2] 15 & 16 Geo. V. c. 33.

(13) manse mail, (14) heritors' assessments, (15) shares of expense of maintenance of common property rights. Of these last the most important is probably the roof; at least it is important to remember that the implied rule is that the whole liability falls on the top flat, each owner on that flat being liable for so much of the roof as covers his property.[1] The roof, it is thought, includes the rhones and probably also a rain-water pipe from the rhone if used only for that purpose. But chimney-stalks are different, and the practice in Edinburgh is to charge repairs to the owners who have vents in them in proportion to the number of the vents. Chimney-cans are maintained by their owners.[2] The hatchway to the roof is a charge to all who use it.

1348. An express clause of apportionment in the disposition is in practice usually relied on as sufficient according to its terms, but experience shews that it may prove defective owing to want of title in the granter. An example was furnished by the case of *Johnston* v. *Irons*.[3] Such clauses generally fail owing to what may be called priority of infeftment or ranking between them and an inconsistent clause, or the absence of a corresponding clause, in an earlier or later deed applicable to another part of the property. The clause will be effectual (1) if it occurs in a title common to the whole property, or so far as it is a common title, or (2) if it is created a real burden or a law of the tenement by one who is competent to do so. But, to take the common case of the roof, if the proprietor of the whole tenement first dispones the lower flats, and provides nothing about the roof, he cannot, when he comes to sell the top flat, exempt it from its common law exclusive liability for the roof, and any clause purporting to make the roof a common charge on all the flats in certain proportions will be ineffectual against the owners of the lower flats. Again, if the common owner first dispones the top flat with a clause of partial liability only, but with no other machinery burdening the remainder of the tenement, and after the purchaser is infeft dispones the lower flats to a third party and provides nothing regarding the roof, the lower proprietor will not be liable for any share of the maintenance of the roof.

(viii) *Relation of Exceptions to Warrandice.*

1349. It is important to note the difference between an exception from or burden on, or other qualification of the dispositive clause, on the one hand, and a similar qualification of warrandice on the other hand. Thus (1) a disposition of X. with warrandice, but with a declaration that the warrandice is not to extend to Y. (part of X.), is a title on which the disponee may maintain against the world all the title which the disponer had, and further, it is a title which will be a basis of prescription of Y.; whereas a disposition of X., excepting Y., is, despite an unqualified warrandice, limited to X. minus Y., and on it a title to Y. can never be

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[1] *Sanderson's Trs.* v. *Yule*, 1897, 25 R. 211.
[2] *Whitmore* v. *Stuart & Stuart*, 1902, 10 S.L.T. 290.
[3] 1909 S.C. 305.

prescribed. (2) A disposition of X., under burden of a specified servitude, with warrandice, gives the disponee no right to the lands except under burden of the servitude, and no claim on the warrandice on account of the servitude; whereas a disposition of X. with warrandice, but excepting from the warrandice the specified servitude, leaves the disponee free to dispute the servitude, but gives him no claim on the warrandice if the servitude should prove to be effectual. Where the purchaser consented that the servitude should be stated as a qualification of the dispositive clause, but objected to the warrandice being similarly qualified, the Court held that the vendor was entitled to have the qualifications in both clauses.[1] (3) A disposition of "the superiority of the lands of X. feued to A." can never found a title to more than the superiority; whereas a disposition of "the lands of X.," but excepting from the warrandice the feu-right in favour of A., gives a title on which the *dominium utile* may be prescribed; and further, the exception is held to be limited to recorded feus,[2] at least if it is in general terms an exception of feu-rights, without naming the feuars or identifying their titles, so that if the feuar has neglected to take infeftment, the new title will cut him out. In such a case it appears that the feuar would have no claim against the granter of the feu, it being indicated that he must blame his own dilatoriness.

Subsection (3).—*Term of Entry.*

1350. When a "void and redd" subject is desired, the proper expression in missives is "with entry and vacant possession at ," and in the disposition "with entry and natural possession at ." If the vendor is in natural possession it is thought that he is bound to quit on 15th May or 11th November unless otherwise provided. The position created by the Rents Restriction Acts is common knowledge, and it is usual in dispositions of subjects to which those Acts apply to add after the term of entry "subject to leases, tenancies, and rights of occupation whether by statute or otherwise."[3] When there is a garden it is convenient, even in small properties, to have access to it in advance to prepare for the season by working and manuring the ground, pruning, sowing, and planting, and it appears that this right is implied where the garden is more than a mere decorative adjunct.[4] A postponed entry does not bar or postpone infeftment.[5] Other clauses in the deed fall to be interpreted according to the facts at the date of entry.[6] When the arrangement regarding the purchaser's right to rents is special, or the position in that respect contains an element of doubt or question, and the assignation of rents clause is in a qualified form, the clause of entry should be qualified "subject to the terms of the assignation of rents hereinafter contained."

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[1] *North British Rly. Co.* v. *Edinburgh Mags.*, 1893, 20 R. 725.
[2] *Ceres School Board* v. *Macfarlane*, 1895, 23 R. 279.
[3] See Charter (Feudal).
[4] Bell's Prin., s. 1278; Rankine, Leases, p. 340.
[5] *Anderson* v. *Dickie*, 1913, 2 S.L.T. 198.
[6] *Burgh-Smeaton* v. *Whitson*, 1907, 14 S.L.T. 839.

SUBSECTION (4).—*Assignation of Writs.*

1351. In the ordinary case this clause serves no real purpose beyond furnishing a convenient place at which to introduce a statement of what the arrangement is regarding delivery, custody, and production of the writs; on that it is enough to note that delivery of writs or securities is not an implied obligation of the vendor. If the writs relate to the property only, or if the vendor has the custody and control of them, he is bound to deliver, but it is not to be assumed that this extends beyond the charter and a legal progress. Between the charter and the commencement of the prescriptive progress there may be writs which have an antiquarian or historical value, and in such a case it may be that the vendor is entitled to retain them.[1] But there are cases in which additions fall to be made to the assignation of writs which give it great importance, *e.g.* assignations of claims of damages for injury to the property, for subsidence damage, collateral obligations and rights of relief against stipend, augmentations, casualties, etc. A form of special assignation is given in Schedule M to the 1874 Act.

SUBSECTION (5).—*Assignation of Rents.*

1352. As in the case of the assignation of writs, any special arrangement should be repeated at full length in the disposition, with a detailed inventory or statement annexed if the case requires it. See CHARTER (FEUDAL).

SUBSECTION (6).—*Obligation of Relief.*

(i) *General.*

1353. This is a business clause of great importance. It should be treated as such and not as a mere technicality or formality. The contract should be set out and no reliance should be placed on any assumption that the terms of missives or articles of roup will rule by implication. The statutory clause should be adopted only if it correctly expresses the contract. In cases where the purchaser's right to rents is the subject of special arrangement, the relative matter of the point at which his liability for outgoings is to commence should be considered and expressly dealt with in this clause. It is thought that neither party is bound to adopt the statutory form of clause merely because it is not negatived in the contract. But even if it is inserted without qualification in the disposition it appears to be the better view that it does not exclude apportionment of feu-duty, ground-annual, and public burdens between the parties in proportion to possession, though here again it is to be remembered that "possession" is a vexed term in regard to farms, especially grass farms. The opinion in favour of apportionment is based on the analogy of the case of *Lord Glasgow's Trs.* regarding rents;[2] in regard

[1] *Porteous* v. *Henderson*, 1898, 25 R. 563.
[2] *Lord Glasgow's Trs.* v. *Clark*, 1889, 16 R. 545.

to feu-duties there are sheriff court decisions or dicta both ways.[1] A sharp case is a sale at Whitsunday, when the feu-duty is payable annually at Martinmas. In that case the convenient course is to deduct one-half of the year's feu-duty from the price at settlement, leaving the purchaser to pay the year's feu-duty at Martinmas.

(ii) *Casualties.*

1354. The subject of casualties is not developed here.[2] It is not a reason for omitting the word "casualties" that the vendor has paid a casualty or that no casualties attach to the immediate feu owing to extinction or for any other reason. On the other hand, if the vendor's obligation is not to cover casualties, it is not enough to omit that word; the obligation ought to be expressly negatived. The incidence of liability for redemption of casualties may also be expressly stated.

(iii) *Income Tax.*

1355. Income tax liability may or may not be technically covered by the statutory clause of relief as interpreted in s. 8 of the Titles Act, 1868, but in any case it has to be taken into account certainly so far as Schedule A is concerned, and, it may be, also Schedule B (or D). With entry at Whitsunday the seller must pay the whole tax for the tax year to 5th April preceding, and, strictly, he can be made to pay a proportion for the period from that date to 15th May, which latter, however, is often not insisted in when the entry is at Whitsunday. Up to and including the tax year 1926–27 there has been the specialty that the second instalment of the tax was not payable till the July after the expiry of the tax year, and arrangements had to be made to ensure that the seller paid or provided for it at settlement at Whitsunday. Now the Schedule A tax is to be collected wholly in January of the tax year, and when it is collected through tenants and deducted by them from their rents special stipulations to meet that situation may be required.

(iv) *Stipend.*

1356. Stipend (grain) is not payable until the spring following the year (ending at Martinmas) to which it applies. On a Whitsunday entry it is divided; on a Martinmas entry the seller pays the whole. Thus, in the case of a sale at Whitsunday 1927, the seller has a postponed liability for one-half of the 1927 stipend, payable in spring 1928. Under the Church of Scotland Act, 1925,[3] all stipends are ultimately to be payable in cash, vesting *de die in diem*, and payable at Whitsunday and Lammas for the preceding half-year. But for the year of standardisation the terms are to be Lammas of that year and Candlemas

[1] *Cushnie* v. *Jessiman*, 1913, 29 Sh. Ct. Rep. 333 (refusing apportionment); *Abel* v. *Bothwell's Trs.*, 1874, Journal of Jurisprudence, Vol. 18, p. 340, *contra*; see *Wigan* v. *Cripps*, 1908 S.C. 394.

[2] See CASUALTIES OF SUPERIORITY, *ante*, Vol. III. p. 89.

[3] 15 & 16 Geo. V. c. 33.

of the following year (s. 8), so that in that year there will be payable the full stipend of the preceding year in spring and one-half of another year's stipend in August; and in the following year there will be payable three half-yearly sums at Candlemas, Whitsunday, and Martinmas. These matters will require regulation between disponer and disponee.

1357. Under the Church of Scotland Act, 1925, the standard charge for stipend is a real burden on the land and is a catholic charge unless allocated by the Church trustees and the disponer of part (s. 13). If on any part the standard charge allocated or retained is more than £1 but less than £15 there is an augmentation of 5 per cent. (s. 13). Redemption liabilities to extinguish the standard charge must also be faced, namely: (1) if the original entry of charge in the roll is £1 or less there must be redemption which may in the owner's option be by single capital payment at eighteen years' purchase or by an instalment scheme during eighteen years (s. 14); if allocation puts or leaves £1 or less on any part, the disponer must redeem by single capital payment at twenty years' purchase (s. 13). These matters will call for attention according to circumstances. If an instalment redemption scheme has been adopted by the seller, the future instalments may be, though it is thought they are not, encumbrances which, unless otherwise stipulated, he is bound to clear off. If a charge of £1 or less arises by allocation on the part disponed (though that is improbable) it will no doubt be expressly conditioned that the disponee should relieve the disponer of the compulsory capital redemption.

(v) *Heritors' Assessments.*

1358. Heritors' assessments are usually in landward parishes, and sometimes in others,[1] based on the valued rent; when on the real rent see s. 28 (6) of the Church of Scotland Act, 1925. Information can be obtained from the Clerk to the Heritors. The liability is not affected by the creation of a parish *quoad sacra*. *Quære* whether the assessments are *debita fundi*.[2] They fall, without relief, upon the proprietor at the date when the assessment is imposed, though the money may be applied to meet expenditure incurred before the date of his entry.[3] This may be a heavy item. Reference is made to the special and final liability under s. 28 of the Church of Scotland Act, 1925. See CHURCH.[4]

(vi) *Local Authorities' Regulations.*

1359. This refers to the very common case of demand by the authorities of counties and burghs for the execution of such works as roads, pavements, improvements, and repairs. The position as regards these in

[1] Ecclesiastical Assessment Act, 1900; Mair's Digest, 4th ed., p. 483.
[2] Mair's Digest, 4th ed., p. 484.
[3] *Maitland* v. *Maitland*, 1877, 4 R. 422; *Malcolm* v. *Mackay*, 1905, 12 S.L.T. 621.
[4] *Ante*, Vol. III. p. 359.

relation to the ordinary clause of relief in a disposition was considered by Lord Kyllachy in a modern case.[1] It was there held that liability arose, not when work was completed and paid for by the authority, but only after the authority had allocated the total expenditure upon the different properties. It has been held in England [2] that there is no duty on the seller to disclose a notice served by the local authority upon him regarding work to be done.

(vii) *Tenants' Claims.*

1360. These certainly do not fall under the statutory clause of relief in a disposition, but where they require to be dealt with, it is usually done at this place in the deed. The most common claims by tenants which affect a purchaser are claims to erect, construct, or repair buildings, fences, drains, etc.; to make roads, to take over live-stock, straw, mill, etc., also claims for improvements or for disturbance. The leases will be examined, and the purchaser may call for evidence of any consents given by the landlord, and notices given by the tenants under the Agricultural Holdings Acts. It is for consideration whether the seller should not give the purchaser notice at least of the former, viz. consents by him to the execution of improvements by tenants. This whole matter is constantly the subject of a special amplification of the clause of obligation of relief in dispositions, and, needless to say, it, or rather the corresponding clause in the antecedent contract, calls for most careful consideration on both sides. The disponee is not by implication affected by claims by tenants who quit possession at the term of his entry; [3] but then the usual purpose of the clause under consideration is to reverse that position.

Subsection (7).—*Warrandice.*

(i) *Testamentary Dispositions.*

1361. In supplement of what is contained on this branch of the subject in the article on Charter (Feudal) there are here added some further practical comments. If it happens that the disposition is testamentary, a clause of absolute warrandice (and that is implied even in a testamentary deed by the words "I grant warrandice") ought not to be inserted as matter of form, for it may make a very great difference in the operation of the bequest. The testator's intention should be ascertained and expressed in clear and plain language. On the one hand, it may be intended that the legatee shall take the property subject to such debt as affects it at the date of the deed, and as may affect it at the death of the testator. That is what the law implies [4] if it is not

[1] *M'Intosh* v. *Mitchell Thomson*, 1900, 8 S.L.T. 48, founding on *Currie* v. *M'Gregor*, 1871, 44 Sc. Jur. 18.

[2] *Leyland and Taylor's Contract*, [1900] 2 Ch. 625; see also *Farrer and Gilbert's Contract*, 1913, 58 Sol. J. 98; *Beyfus* v. *Lodge*, 1925, 41 T.L.R. 429.

[3] *Waddell* v. *Howat*, 1925 S.C. 484.

[4] *Brand* v. *Scott's Trs.*, 1892, 19 R. 768.

altered by any specialty such as a clause of warrandice. It is advised, however, that this intention be plainly stated in the deed, and then of course there will be no clause of warrandice of any kind. If, on the other hand, the general estate is to be bound to clear the specific property of all debt, present and future, so that the property shall pass to the legatee unencumbered, that should be expressed, and it may be reinforced by a clause of express absolute warrandice.

(ii) Inter vivos *Dispositions.*

1362. The following matters have to be borne in mind: (1) The formal statutory clause of warrandice means absolute warrandice, though the deed is gratuitous, or against any one of the granters whose concurrence is gratuitous; (2) this indicates a special risk in the case of consenters, who may be involved in absolute warrandice wholly unintentionally; (3) it is not sufficient to rely on a clause of warrandice expressly qualified, for in certain circumstances there may concurrently subsist a higher degree of warrandice implied from the nature of the transaction,[1] and, therefore, there is required in such cases an express negation of any other warrandice than that expressed; (4) an exception of some right, *e.g.* a bond, from the warrandice is not rendered unnecessary on the ground that the disponce has knowledge of the right in question;[2] and (5) when there are two or more granters, say *pro indiviso* owners, it may be that joint and several liability results from an unqualified clause "and we grant warrandice"; therefore in such a case the obligation of each ought to be defined and limited, and the limitation ought to be in proportion, not to his share of the price, but to his share of the property. The position is not altogether clear, and accordingly, when the intention is that the granters shall be liable jointly and severally, that should be express.[3]

(iii) *Warrandice in Relation to the Contract.*

1363. When the contract of sale contains restrictive clauses, *e.g.* barring obligations to the extent, boundaries, and title, it seems somewhat incongruous that a contract of that fettered nature should forthwith be followed by a disposition under which the vendor grants absolute warrandice without any qualification. That is in fact the common practice, and it is decided that the benefit of the restrictive clauses is not lost to the seller as against the purchaser by the absence from the disposition of any repetition of, or reference to, the restrictive clauses contained in the articles of roup.[4] But the questions arise—is the seller entitled to qualify the clause of absolute warrandice in the disposition? and does it make any difference if the contract has in terms stated that

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[1] *Ferrier* v. *Graham's Trs.*, 1828, 6 S. 818.
[2] *Horsburgh Trs.* v. *Welch*, 1886, 14 R. 67.
[3] As to warrandice in cases of subsales see para. 1379, *infra.*
[4] *Young* v. *M'Kellar*, 1909 S.C. 1340.

absolute warrandice will be given? It is to be remembered that warrandice runs with the lands, and subsequent proprietors might be entitled to found upon it as unrestricted, though it is thought that, looking to the nature of warrandice as a mere personal covenant, they could not do so.[1] It is thought that the disponer is entitled to import into the disposition all relevant clauses in the missives.

Section 4.—Disposition of Superiority.

Subsection (1).—*Legal Restrictions.*

1364. In dealing with an estate of superiority it has to be kept in view that it is only after separation of the property by charter and infeftment that such an estate can exist so as to be capable of transmission. The estates cannot be separated by words or description, but only by actual infeftment detaching the property from the original *plenum dominium*. It was attempted in vain, therefore, to effect a separation by conveying the *dominium directum* to one disponee and the *dominium utile* to another, no vassalage having been created by infeftment;[2] nor is such separation effected by a disposition of property under reservation of the superiority.[3]

1365. A superior may, on granting feu-rights, reserve power to divide the superiority without the vassal's consent; in the absence, however, of such a reservation, a vassal can object to the superior's conveying the superiority in fee[4] or liferent[5] in different portions to different parties. The reason of this rule is, that the vassal is not bound to hold the property of more than one superior; for holding of two or more superiors increases the number of persons to whom the feudal services are due, and, prior to the commencement of the Conveyancing Act, 1874, multiplication of superiors put the vassal to the expense of more than one entry.[6] But a conveyance of a fee of superiority to two or more persons jointly is not a multiplication of superiors to which a vassal can object, because the disponees have only one estate vested in them.[7] Where two feus had been originally distinct, and had afterwards come to be included by the superior in one charter by progress, which described the lands therein separately, and contained distinct clauses of *reddendo*, the superior was held not to have lost the power of separate disposal of the *dominium directum* applicable to each feu;[8] and it was also held that where there were separate subjects held by separate titles of the same

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[1] *Duchess of Montrose* v. *Stuart*, 1887, 15 R. (H.L.) 19; *Leith Heritages Co.* v. *Edinburgh and Leith Glass Co.*, 1876, 3 R. 789.

[2] Menzies, Convey. p. 666, citing *Norton* v. *Anderson*, 6th July 1813, F.C.

[3] *Norton, supra*; and as to separation, see also *Williams and James* v. *Maclaine's Trs.*, 1872, 10 M. 362.

[4] *Duke of Montrose* v. *Colquhoun*, 1781, Mor. 8822; affd. 6 Pat. 805.

[5] *Graham* v. *Westenra*, 1826, 4 S. 615.

[6] See *Montrose* and *Graham, supra*; and *Maxwell* v. *M'Millan*, 1741, Mor. 15015, 8817; Elch. No. 4, "Superior and Vassal"; *Sinclair* v. *Sinclair*, 1754, 5 Bro. Supp. 812.

[7] *Cargill* v. *Muir*, 1837, 15 S. 408; and see *Lady Luss* v. *Inglis*, 1678, Mor. 15028.

[8] *Lamont* v. *Duke of Argyll*, 23rd June 1813, F.C.; rev. 1819, 6 Pat. 410.

superior, and the property of the subjects was acquired by one person, the holder of the superiority, who had not included the subjects in the same charter, was not debarred from selling separately the superiority of each subject.[1] The right to object to the splitting of the superiority can be waived by the vassal's consent or acquiescence, or lost by the negative prescription.[2] But the vassal's consent to one kind of multiplication of superiors did not prevent him from objecting to a different multiplication;[3] nor does his acquiescence for more than forty years in a division of the superiority among liferenters cut off his right to challenge the division of the superiority among fiars.[4]

1366. Just as a vassal can object to the multiplication of superiors, so he can object to the interjection of a mid-superiority fee between the superiority and the property.[5] The reason of this is, or at least was before 1874, that he had an interest to object to the number of superiors between himself and the Crown being increased. But, as in the case of multiplication of superiors, objection to the interjection could be barred by a reserved power in favour of the superior to create a mid-superiority fee, or waived by the vassal's consent or acquiescence,[6] or cut off by the negative prescription; and did not apply when a superior, into whose hands a feu had fallen by forfeiture, bestowed a forfeited estate on a new vassal.[7] A vassal cannot object to a superior's granting a heritable security over the superiority; for, although the creditor can levy the feu-duties, his security does not create a mid-superiority fee, but is a mere burden on the superiority.[8]

SUBSECTION (2).—*Form of Deed.*

1367. There is not, and has never been, any difference between the form of a disposition of a superiority and the form of a disposition of property, with these three exceptions—(1) often in the narrative clause of the disposition of superiority the disponer is designated superior; it is more correct to adhere to the form common in other dispositions and to say "heritable proprietor"; for the granter is not superior, but proprietor of the estate disponed, namely, the superiority; and besides it is better practice to say nothing which might appear to be inconsistent with the deed ultimately being used as a title to the *plenum dominium;* (2) the disposition of superiority assigns feu-duties, or blench duties, and casualties, whereas the disposition of property assigns rents; but, again, the words ought rather to be "rents, duties, and casualties," and it is to be noted that "feu-rents" and "feu-rental" are expressions which always have been, and still are, in common use; (3) the dis-

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[1] *Dreghorn* v. *Hamilton*, 1774, Mor. 15015. [2] Bell, Convey. ii. 754.
[3] *Mure* v. *Westenra*, 1824, 3 S. 17. [4] *Stewart* v. *Houston*, 1823, 2 S. 300.
[5] *Douglas of Kelhead* v. *Torthorell*, 1670, Mor. 15012; *Archbishop of St. Andrews* v. *Marquis of Huntly*, 1682, Mor. 15015; *Stewart* v. *Lord Abbotshall*, 1610, Mor. 15012.
[6] *Hotchkis* v. *Walker's Trs.*, 1822, 2 S. 70.
[7] *Earl of Argyle* v. *M'Leod*, 1672, Mor. 15013; *Duke of Gordon* v. *M'Intosh*, 1714, Mor. 10975.
[8] *Home* v. *Smith*, 1794, Mor. 15077; Bell, Convey. ii. 753.

position of superiority excepts from the warrandice clause the feu-rights of the lands.[1]

1368. In a disposition of superiority the dispositive clause usually conveys the lands; and that is the correct practice. But the superiority or *dominium directum* can be disponed *per se* without a conveyance of the lands themselves.[2] Any real burdens affecting the disponer's title can be set forth, either *ad longum* or by reference in statutory form, in a disposition of superiority. When a superior has a right to the minerals of the feu, a disposition of the superiority will carry the minerals also, unless the deed shews that it was not intended to include them.[3] While the rule is that obligations enforceable by or against a superior are enforceable by or against his disponee in the superiority, yet the superior may be under obligations which, because personal to himself, do not bind his disponee.[4]

1369. Though there is no difference in form between a disposition of superiority to the vassal and such a disposition to a stranger, the terms of the destination to the vassal should be particularly considered. The reason is that if the property and superiority are afterwards consolidated, the destination in the superiority title will, in the event of intestacy, regulate the succession to the united fee. A disposition of superiority to a vassal implies a discharge of bygone feu-duties,[5] but such a disposition in favour of a third party gives him no right to quarrel the feu *propter non solutum canonem* for any years during his disponer's holding, not even though he is also the assignee of the latter as regards the earlier unpaid duties.[6]

Section 5.—Dispositions by Parties Uninfeft.

1370. In the sense in which the title of this section is here used these dispositions are the creations of the Conveyancing Act, 1924. Deeds of transmission of personal rights to land, whether by heirs unserved or uninfeft or by holders of unrecorded dispositions, have always been familiar. But in none of these cases was it contemplated, or competent, for the disponee to be infeft *de plano* under the deed in his favour. When the granter was an uninfeft heir, the procedure was that his title was afterwards completed either by himself or by his disponee under a mandate given by the heir to that effect, and the completion of the heir's

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[1] *Ceres School Board* v. *Macfarlane*, 1895, 23 R. 279.

[2] *Gardner* v. *Trinity House of Leith*, 1841, 3 D. 534; *Hamilton* v. *Bogle*, 23rd February 1819, F.C.; 1 Ross's L.C. 22; *Hill* v. *Duke of Montrose*, 1828, 6 S. 1133; *Mackenzie* v. *Mackenzie*, 14th December 1822, F.C.; *Williams and James* v. *Maclaine's Trs.*, 1872, 10 M. 362; and cf. *Park* v. *Robertson*, 16th May 1816, F.C. (overruled by *Hamilton* and *Gardner*, *supra*).

[3] See *Orr* v. *Moir's Trs.*, 1892, 19 R. 700; affd. 1893, 20 R. (H.L.) 27; and *Fleming* v. *Howden*, 1868, 6 M. 782.

[4] *Durie's Trs.* v. *Earl of Elgin*, 1889, 16 R. 1104.

[5] *Earl of Argyle* v. *Lord M'Donald*, 1676, Mor. 6323.

[6] *Lord Wedderburn* v. *Nisbet*, 1612, Mor. 6322, 7181; *Maxwell's Trs.* v. *Bothwell School Board*, 1893, 20 R. 958.

title accresced to validate his disponee's infeftment. If the granter was the holder of an unrecorded disposition, the disposition by him operated as a transmission of his personal right, and his disponee took infeftment by notarial instrument on the disposition to the seller as transmitted by the disposition by the seller. But the idea of s. 3 of the 1924 Act is essentially different, namely, that the disposition by the uninfeft owner shall of itself be a warrant for *de plano* infeftment, without recourse to the principle of accretion.

These new provisions are very useful in, for example, the ordinary case of an infeft (or uninfeft) testator, for his testamentary trustees can thus give a title to a purchaser or beneficiary without themselves taking infeftment. This saves a good deal of expense, including recording dues; and indeed it may be found on taxation that the expense of completion of the trustees' title will be disallowed in cases where early sale or denuding was intended or directed.

1371. The granter must be a person "having right to land by a title" (1924 Act, s. 3). The following are not in that position: (1) A judicial factor who has not obtained warrant to complete title; [1] (2) a purchaser under missives; (3) a beneficiary under a trust, even though the trust should be of specific heritage and immediately enforceable; (4) trustees and executors who fall within s. 46 of the 1874 Act (but this is doubtful); (5) the holder of an unrecorded writ of *clare constat*, for though he has right to land, and by a title, it is an unassignable title; [2] therefore before the 1924 Act, if he had purported to assign it, and the disponee had taken infeftment by notarial instrument, the title would have been bad. Accordingly a title under s. 3 of the 1924 Act would now be bad under the test imposed by the later words of that section, namely: "The title of the grantee thereof shall be in all respects in the same position as if his title were completed . . . by notarial instrument duly expede and recorded according to the present law and practice"; (6) the holder of a personal right under s. 9 of the 1874 Act, for he holds no title.

1372. Section 3 of the 1924 Act (as just quoted) speaks of the title of the "grantee" of the disposition by an uninfeft owner being completed by recording. But "grantee" includes "heirs, disponees, and assignees" of the grantee (1924 Act, s. 2, and 1868 Act, s. 3). On the other hand, s. 3 of the 1924 Act requires that the disposition itself shall be recorded. The result, it is thought, is that the disposition is transmissible, but the title of the transferee (heir or assignee) must be made up in such a way that the disposition (or first disposition) is actually recorded.

1373. Sec. 3 of the 1924 Act covers the case of a judicial factor who has obtained warrant to complete title in the form pointed out in subsec. (3) of s. 5 of the Act, but has not recorded the extract decree; the warrant is expressly declared to be a disposition under s. 5 (3). But it is strongly recommended that all such extracts and all dispositions

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[1] *Leslie's Factor*, 1925 S.C. 464. [2] Bell's Prin., s. 1822.

under s. 3 be at once recorded. It should be noted that in feudal property rights s. 3 applies only to "dispositions" and that that word is not defined in any of the Acts.

1374. It matters not how many steps of title there have been between the last infeftment and the present owner, nor what is the nature of those steps. In the disposition granted by the present owner there is inserted a clause naming and designing the person last infeft, stating that he was the person last infeft, and specifying his infeftment, but only by the register and the date of recording; and there is also inserted a deduction of title in a simple form, specifying the writs between the last infeftment and the present owner. These things being done, the disposition is a warrant for *de plano* infeftment of the disponee. The method is available though the property sold is only part of what is included in the last recorded title. As already stated, there must be inserted the name and designation of the holder of the last recorded title, specifying also the register and the date of recording. It is suggested that where the last recorded title was in favour of two or more persons, they ought all to be named and designed, and that in the case of trustees the names and designations of the individual trustees should be given, adding, *e.g.* "the testamentary trustees of X." with X.'s designation, but that there is no necessity to make any reference to the will or trust-deed. In connection with this matter of designations it will often happen that the description of the property in the deed is by reference to the last recorded title. In descriptions by reference designations are not now required, but the person last infeft must be designed in deeds the granter of which is not infeft; and where this collision occurs the person will be designed at the point in the deed at which he is first mentioned.

1375. In regard to the deduction of the title from the last recorded title to that of the present granter, every link of title should be specified, but as to the manner and form of doing so, all that is required is to identify the links, and so long as that is done, it cannot be said that any particular mode of identification is required or that its absence is fatal.[1] It cannot be maintained that in the case of each link it is essential to name both granter and grantee, or both or all the granters or grantees when more than one, or to give the individual names of "the trustees of A.," or to give designations, or to give both the date of a writ and the date of its registration if registered, or to give both or all dates if more than one. The specification of register (*e.g.* Books of Council and Session) and date of registration go a long way towards identification, and when these particulars can be and are given, it is thought that designations may well be omitted. There need be no "narration of the contents" of the steps in the title (s. 2 (3)). Sec. 5 (1) of the 1924 Act contains something like an enumeration of the documents (including statutes and minutes of meetings) which may form links in the deduction of title, and also directions as to what is sufficient *prima facie* evidence of minutes of

[1] See definition of deduction in s. 2 (3) of the Act.

meetings to enable the deduction of title to be made in a notice of title or *in gremio* of a disposition by an uninfeft owner.

1376. The uninfeft granters of dispositions will probably generally be testamentary trustees, and special consideration therefore may be necessary as to the details of the specification, in the deduction of title, of the testamentary writings with reference, *inter alia*, to alterations in the trusteeship by codicils, or by death, declinature, resignation, or assumption of trustees, and the following suggestions are made—(1) in referring to any form of will, to specify any codicil which contains any appointment of trustees; (2) among the trustees to mention any one who predeceased the truster and to state the fact of predecease; (3) to mention also any one named as a trustee who declined office, and to specify the minute of declinature as a step in the title; (4) but not to mention any one named as a trustee whose appointment was revoked by the testator; (5) to mention assumption and specify the deed of assumption; (6) if, for example, the deduction of title up to a certain point shews three trustees A., B., and C., and if the next step is a deed by, say, C. as sole trustee, to explain the omission of A. and B. by referring to the fact of death or resignation, whichever is the case, and in the latter event to specify the minute of resignation as a step in the title.

1377. Notwithstanding the enactment in s. 2 (3) of the 1924 Act, that it is not necessary to have any narration of the contents of the steps in the title, it is suggested that in some cases it may be convenient to have something of that nature but very briefly expressed. Thus (1) where the will creates no trust and takes the form of certain direct specific bequests of heritage or moveables, or both, followed by a direct beneficial residuary clause, it may be thought desirable that the deduction of title should contain enough to shew on the face of it that the property to which it relates falls within the residuary bequest. (2) In the same case it may be desirable that in a disposition by one of the prior legatees of specific heritage the deduction of title should mention the extent to which the will is in his favour. Besides, such a specification may be very convenient if the specific asset has been described in very popular terms in a home-made will; and the same thing holds when in the will the legatees are identified without being named. (3) Referring to s. 46 of the 1924 Act, it appears that the specification of a decree of reduction as a midcouple operates as notice, so as to deprive onerous *bona fide* transferees of the protection of that section. A mere mention of "a decree of reduction by the Court of Session at the instance of A. against B.," with dates, might not be anything like reasonable notice unless there was a narrative of the contents of the reduction to the extent of specifying the document reduced.

1378. But it is not suggested that the matters referred to in the last two paragraphs (except perhaps to certain effects the decrees of reduction) are essential. The clause is a mere deduction of title, and it is the writs themselves which are the title. Thus in the case of changes in the trusteeship, it cannot be doubted that a reference to a deed as granted by

"the accepting surviving original and assumed trustees" will cover a great deal.

Section 6.—Disposition to Sub-Purchaser or Purchaser's Nominee.

1379. It is common for the vendor to be asked to dispone to some one other than the person to whom he sold, *e.g.* a sub-purchaser of the whole or part or some one for whom it is subsequently stated that the purchase was truly made. In most cases it is difficult to imagine a reason for objecting, keeping in view that the original purchaser could always dispone in turn at once, or, indeed, assign the disposition.[1] There may, however, be exceptional cases, as when *delectus personæ* is involved in relation to a liquor licence.[2] The consent of the original purchaser ought to be given in writing, and the best and usual means of keeping a record of it is to have the deed signed by him. The risk and expense which the vendor and his agent may incur through a departure from this rule are exemplified in the case of *Anderson*,[3] where the superior's agents acted upon the request of the original feuar's agent. The warrandice clause may require careful adjustment to meet the rights of all parties. The original vendor cannot be made to grant warrandice in such terms as to extend to anything done or suffered by the original purchaser. The original purchaser must himself grant warrandice, and he is interested to see that the original vendor does so also subject to the qualification stated. The ultimate purchaser is entitled to warrandice from his immediate vendor, with whom alone he has contracted.[4] But these relations are sometimes altered by the terms of the second transaction; thus an important part of the west end of Edinburgh was developed under contracts by which the building firm sold on condition that the purchasers should obtain direct charters from the superiors without any warrandice by the builders.

1380. In cases of subsale the following further matters are to be kept in view: (1) The capacity of the original purchaser to enter into the contract of sale and to grant the disposition cannot be judged of more leniently than if he were first infeft. (2) A personal search against him is required. (3) The stamp duty is regulated by the last price, whether more or less than the first or any intermediate price. If the subsale is partial only, the stamp requires special consideration. Thus if A. buys from B. for £10,000, subsells part of the property to C. for £10,000, and takes two dispositions from B., one to himself and the other to C., it is not enough to stamp C.'s disposition with £100, and his own with 10s. The proper stamping depends on what is the fair relation of value

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[1] Duff, Feudal Conveyancing, p. 189; Bell, Convey. ii. p. 701; Addison on Contract, 9th ed., p. 483; *Shaw* v. *Foster*, 1872, L.R. (H.L.) 321.

[2] *Mitchell* v. *Brown*, Lord Kincairney and First Division, 1900 (unreported).

[3] *Anderson* v. *Dick*, 1901, 8 S.L.T. 482.

[4] *Mackenzie and Ors.* v. *Neill*, 1899, 37 S.L.R. 666.

between the part subsold and the remainder of the property. To take an extreme case, if A. had been very successful, the fact being that the part retained by him is worth as much as the part subsold to C., the disposition in his own favour will fall to be stamped on a value of £5000 (one-half of the original price), and the disposition to C. must be stamped on a value of £10,000, being the last price for that part.

Section 7.—Relation of Disposition to Missives.

1381. This is a matter of great importance and one which requires to be attended to in practice with much care. When a disposition in implement of sale has been delivered to and accepted by the purchaser, it becomes the sole measure of the contracting parties' rights, and supersedes all previous communings and contracts, however formal.[1] This holds though the disposition bears reference to the previous contract.[2] This view was not acquiesced in by Lord President Inglis in a case [3] where the question was the nature of the bargain between the parties as to the purchaser's right to rents.[4] More recently it has in some sort been treated as an open question in the House of Lords where the matter in dispute was the rights of parties in regard to a gable,[5] though in this latter case no real support was given to the contention that on such a question it is competent to go behind the disposition to the missives. In construing a disposition following on a decree arbitral it may be allowable to refer to the decree arbitral.[6]

1382. When "missives" are referred to in this connection it is to be understood that the term includes documents formal or informal, *e.g.* letters, minutes of sale, and articles of roup. But the rule must not be carried too far. "It is not competent to go behind a deed of conveyance which exhausts the subject-matter of the contract, but in the case of a deed which either bears to be in part performance or can be shewn by comparison to be only in part performance, the contract subsists until performance is complete." [7] The question in that case was as to fittings, and it was held that if fittings are in the missives the purchaser is entitled to them although they are not also in the disposition. Indeed Lord Kinnear said: "A sound conveyancer in framing a disposition for carrying out such a sale will not think it necessary to insert a futile conveyance of the moveables which would carry nothing." With deference it is suggested that the words "with fittings and fixtures," or as the case may be, ought to be repeated; they add practically nothing to the length; and they avoid the necessity of preserving the missives. In practice that course is commonly taken, and it is to be remembered that a deed of

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[1] Lord Watson in *Orr* v. *Moir's Trs.*, 1893, 20 R. (H.L.) 27.
[2] *Lee* v. *Alexander*, 1883, 10 R. (H.L.) 91.
[3] *Lord Glasgow's Trs.* v. *Clark*, 1889, 16 R. 545.
[4] *Wigan* v. *Cripps*, 1908 S.C. 394, to same effect, but see *Butter* v. *Foster*, 1912 S.C. 1218, *contra*.
[5] *Baird* v. *Alexander*, 1898, 25 R. (H.L.) 35.
[6] *Great North of Scotland Rly. Co.* v. *Duke of Fife*, 1901, 3 F (H.L.) 2.
[7] *Jamieson* v. *Welsh*, 1900, 3 F. 176.

disposition of corporeal moveables has long been known in practice. The decision in *Jamieson* [1] turned on the fact that the contract related to two separate things, the heritage and the moveable fittings. There is a middle case, namely, a sale of heritage with guarantees or obligations, *e.g.* a guarantee of sanitary condition, or an obligation to execute painting and papering, or to uphold plumber work. *Jamieson's* case supports the view that such guarantees and obligations would not be lost because not repeated in the disposition. Thus if the sale includes a house and grates to be supplied, payment of the price and acceptance of the disposition would not bar enforcement of the obligation to deliver the grates. If that be so, would it make any difference that, instead of grates, the articles were wallpapers, and could the obligation to deliver these be preserved, and the further obligation to put them on the walls be lost? It has, however, been held in England that a warranty of sanitary condition was lost because not repeated in the conveyance.[2] The advice is to study the missives closely with the draft of the disposition; to see that the latter contains nothing inconsistent with the missives, and that it exhausts them; or if there are any matters not appropriate for treatment in the disposition, that these are confirmed by writing of even date with, or later than, the disposition, and referring to it.[3]

Section 8.—Various Classes of Disponers and Disponees.

Subsection (1).—*Burghs.*

1383. The town council shall cause all feus, alienations, or tacks for more than five years of any heritable property of the burgh or vested in the council, so far as forming part of the common good, to proceed by public roup, of which public notice shall be given by advertisement published once weekly for at least three weeks immediately preceding the day of roup in a newspaper or newspapers circulating in the burgh.[4]

Subsection (2).—*Unincorporated Bodies.*

1384. As these have no legal *persona*, a conveyance in favour of such a body will be taken to trustees on its behalf. The powers of the trustees to deal with the subjects afterwards depend on the constitution of the body as originally adopted or altered; and it is convenient, if allowed, to have a statement of them *in gremio* of the deed. In the case of a testamentary bequest, if there are testamentary trustees, they will convey to the trustees of the legatee body. But if it is a direct bequest in a settlement in which no trustees are appointed, it is not so simple. Three courses at least are open: (1) to have a judicial factor appointed, and he can convey to the trustees of the

[1] *Jamieson* v. *Welsh*, 1900, 3 F. 176.
[2] *Greswolde-Williams* v. *Barneby*, 1901, 83 L.T. 708.
[3] As to warrandice, see para. 1361, *supra*.
[4] 63 & 64 Vict. c. 49, s. 98.

legatee body; (2) the heir-at-law may complete a title and convey; (3) adjudication.

Subsection (3).—*Pupils.*

1385. If a pupil's heritage is to be sold it can be done only by a guardian acting on his behalf. Tutors and factors *loco tutoris* are trustees [1] and as such have power of sale.[2] The father or the mother acting as guardian of a pupil at common law, or under the Guardianship Acts of 1886 and 1925 [3] are covered by s. 4 of the Trusts Act, 1921.[4] This is subject to *Leslie's* case,[5] and only if not at variance with the "terms or purposes" of the office; [6] and it has to be remembered that the duty of a *curator bonis* is to preserve the estate and not to alter the succession.[7] Under s. 5 of the 1921 Act, the Court may grant power of sale even though at variance with the terms and purposes, if satisfied that the sale is "expedient." This is a relaxation from the former common law rule, which required actual or constructive necessity. The Court may grant power of sale to the guardian by the law of the pupil's domicile.[8] A tutor does not require to complete title in his own person, but a factor *loco tutoris* does, subject to s. 3 of the 1924 Act.[9] The price should be earmarked in any future investment of it, so as to preserve the facts for their bearing on questions of succession.

1386. Though in the ordinary case a tutor would not obtain authority to purchase heritage, there may often be cases in which dispositions fall to be granted in favour of pupils, *e.g.* in implement of a testamentary direction, or the Court may authorise a tutor to accept a reconveyance of a feu.[10] The pupil will be represented by a guardian, but the disposition will be granted in favour of the pupil, and will be recorded with a warrant on his behalf only.

Subsection (4).—*Minors.*

1387. Not even the Guardianship Act, 1925, gives the mother or her appointees any guardianship capacity after the children are beyond pupillarity. The rules are: (1) If a minor has no curator, a disposition by himself alone is good, subject to his right to reduce it within the *quadriennium utile* on the grounds of minority and lesion; (2) if, having a curator, the minor acts with the curator's consent, the result is the same; (3) if, having a curator, the minor acts without consent, reduction is possible within forty years; if there is a curator (including the father as administrator-in-law) or a *curator bonis*, he is within s. 4 of the Trusts Acts, 1921. Warrant for completion of title being un-

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[1] Trusts (Scotland) Act, 1921 (11 & 12 Geo. V. c. 58), s. 2.
[2] *Ibid*, s. 4.
[3] 49 & 50 Vict. c. 27; 15 & 16 Geo. V. c. 45.
[4] Guardianship of Infants Act, 1925 (15 & 16 Geo. V. c. 45), s. 10.
[5] *Leslie's Factor*, 1925 S.C. 464; cf. *Marquess of Lothian's C.B.*, 1927 S.C. 579.
[6] *Dempster*, 1926, S.L.T. 157.
[7] *Macqueen* v. *Tod*, 1899, 1 F. 1063, 1069.
[8] *M'Fadzean*, 1917 S.C. 142, but see para. 1336, *supra*.
[9] See para. 1371, *supra*.
[10] *Gilray*, 1876, 3 R. 619.

necessary,[1] a petition, if any, must be simply for power of sale, but it is not clear on the decisions whether such an application is competent or necessary. In any case a *curator bonis* will report to and consult the Accountant of Court.

1388. An ordinary curator is unable to make up any title in his own person, for he holds no title of the nature of a conveyance, his function being consultative and advisory only. "It is a question whether and how far the common law power and rights of a minor having a *curator bonis* are restrained as compared with those of a minor who has chosen curators for himself." [2] This suggests that when the disponer is a minor to whom a *curator bonis* has been appointed, the deed should be signed by both minor and *curator bonis*, the price being paid to the latter.

1389. No one can be recommended to deal with a minor. Further, it is laid down that no one can be compelled to do so. This probably has reference to a minor without curators, which is clearly correct. But, suppose the title offered is by a minor with consent of his curator, is the purchaser bound to proceed? and does it make any difference whether the sale has been by public roup or private bargain? In the former case it is true that the risk of a successful challenge is remote; but, nevertheless, it is thought that the answer must be that in neither case is the purchaser bound to proceed. An unsuccessful challenge is only less serious than a successful one, and it is a risk which a purchaser cannot fairly be asked to run. But as regards sales by public roup, the purchaser will usually be expressly committed to the title in terms of the articles of roup, for which purpose, indeed, all that would be required would be the statement that the sale was by A. with consent of his curator. It is thought that the non-disclosure of the fact of minority is covered by the rule that when a question is a doubtful one, the seller is bound to give notice of it to the purchaser.[3]

1390. A curator chosen by a minor may put himself under the supervision of the Accountant of Court; [4] and he may then in a proper case obtain power to sell; in the case quoted, the power granted to the curator was not to concur in, but to grant, the disposition; but it is strongly recommended that, even with such an interlocutor, the minor's concurrence should be required.

1391. If a minor purchases property, he may refuse to carry out the purchase on grounds not open to a person of full capacity, namely, excessive price or onerous conditions—in short, that he has made a bad bargain. It makes no difference whether the sale has been by public roup or private bargain, except that in the former case, competition, if any, is evidence of fairness. Nor does it make any difference that the minor has acted with consent of a curator, except that, if the former repudiates, the latter may possibly find a question raised as to the effect

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[1] *Scott*, 1856, 18 D. 624.
[2] Per Lord Pearson in *King's Trs.* v. *M'Lay*, 1901, 8 S.L.T. 413.
[3] *Davidson* v. *Dalziel*, 1881, 8 R. 990. [4] *Gilligan's Curator*, 1908, 15 S.L.T. 1042.

of the form in which he may have given consent as inferring liability on his part to the seller. Assuming the sale to be carried through, the title runs in the minor's name only; but the seller is entitled, and should be advised, to have written evidence of the fact (if it be so) that the minor acted with consent of a curator.

Subsection (5).—*Married Women.*

1392. The Married Women's Property (Scotland) Act, 1920,[1] removed all disability and protection of married women. If the wife is selling, the purchaser cannot require (1) the concurrence, consent, approval, obligation, or warrandice of the seller's husband, in the contract, or disposition, or in any shape or form; (2) ratification; [2] or (3) information as to whether the seller has a marriage contract.[3] If the wife is buying, the seller is not entitled to any information as to the source from which she finds the price. Not only is there no necessity for inserting clauses excluding the right of the purchaser's husband, and purporting to confer upon the purchaser powers of sale, etc., but such clauses are now markedly incongruous. There is an exception if the wife is a minor, as to which see the 1920 Act, s. 2. The Act applies to Scottish heritage irrespective of the husband's domicile (s. 7).

Subsection (6).—*Firms.*

1393. The title standing, as no doubt it does, in the names of certain persons as trustees, they are within the Trusts (Scotland) Act, 1921, and possess the power of sale conferred by s. 4. It is, however, not uncommon to obtain the concurrence of the firm and all the partners. This is sometimes even extended to the representatives of deceased and insolvent partners, unless the contract of co-partnery provides that realisation shall be in the hands of the surviving and solvent partners. It should be ascertained beyond doubt that the firm existing at the date of the sale is the same firm as that for which the property is held, and whether it has the real right to the property. That does not follow merely because the firm names are identical. For this purpose the *Gazette* may require to be consulted.

1394. Though the firm has a separate legal *persona* it lacks the capacity to sustain the feudal relation. The title will therefore be taken to the partners and the survivors and survivor of them as trustees and trustee for the firm. This incapacity of the firm does not extend to leases;[4] these may be held *socio nomine*. This exception apparently holds good even of a lease registered under the 1857 Act.[5] It would also appear that the firm might, *socio nomine*, hold a recorded title to a mere real burden (not a ground annual in the modern form) as not being a feudal estate; and also might in like manner accept and transmit a title to feudal

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[1] 10 & 11 Geo. V. c. 64.
[2] *Ibid.*, s. 20.
[3] *Campbell's Trs.* v. *Whyte*, 1884, 11 R. 1078.
[4] *Dennistoun* v. *Macfarlane*, 1818, Mor. App. "Tack," 15.
[5] 20 & 21 Vict. c. 26.

property as an unfeudalised conveyance on which infeftment might be taken in favour of a disponee. When a partner retires it will be remembered to obtain from him a proper formal conveyance, so as to divest him and avoid in future all questions as to the necessity to obtain his signature.

SUBSECTION (7).—*Trustees.*

1395. By s. 4 of the Trusts (Scotland) Act, 1921, all trustees, in the wide sense stated in s. 2 of the Act, have power to sell, if that is not "at variance with the terms or purposes of the trust." This qualification requires careful attention.[1] Under s. 5 of the 1921 Act the position is much stronger than under s. 3 of the 1867 Act. Under the 1867 enactment the Court could not grant power of sale unless they were satisfied that a sale was "expedient for the execution of the trust, and not inconsistent with the intention thereof," [2] whereas under the 1921 Act while the transaction must be expedient for the execution of the trust, it may be at variance with its terms or purposes. It is still desirable to confer express power of sale in trust-deeds and wills, and it is still important on occasion to consider whether that has been done. The word "sell" is not essential, though it is the best; but various other expressions are equivalent, *e.g.* to "realise" or to " turn into money" or to "convert"; or a direction to the trustees to hold the trust property or the "proceeds" of it.[3] It is now unnecessary to consider cases where the common law would imply a power of sale, for none of these can be at variance with the terms or purposes of the trust, and therefore the proper view now is that they are within s. 4 of the 1921 Act and wholly free from any difficulty regarding the qualification. Unexhausted or continuing powers which may have been obtained by trustees under s. 3 of the Trusts Act, 1867,[4] whether from the Court or by deed of consent, will still remain in force unaffected by the 1921 Act.

1396. It has always been necessary, with reference to express power of sale in the trust-deed or will, to consider whether specific interests have been created in favour of a beneficiary. There may be, *e.g.* (1) a direct conveyance of the special property to a beneficiary in fee, superadded to a general conveyance to trustees; (2) a direction to the trustees to convey the special property to a beneficiary in fee; or (3) a direction to hold it for a beneficiary in liferent. In such cases it is not clear that the position is the same under an express power as under the statutory power contained in s. 4 of the 1921 Act. In any of these cases it is thought that there can be no sale without the consent of the beneficiary in question, or power from the Court.[5] Where there is an express power the consent of the beneficiary, say, a liferenter, is enough; but is

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[1] *Leslie's J.F.*, 1925 S.C. 464; *Marquess of Lothian's C.B.*, 1927 S.C. 579.
[2] Cases reviewed in *Christie's Trs.*, 1904, 11 S.L.T. 786.
[3] *Thomson's Trs.* v. *Thomson*, 1897, 25 R. 19.
[4] 30 & 31 Vict. c. 97.
[5] *Galloway* v. *Campbell's Trs.*, 1905, 7 F. 931.

that so in the absence of express power in the trust-deed or will? In the former case there is *ex hypothesi* an express power in general terms, applicable, therefore, to the property in question, subject only to a right of objection in the liferenter, which objection is excluded when he consents. But when the power is sought to be derived from s. 4 of the 1921 Act, if it be admitted that the specific liferent shews that sale is at variance with the terms or purposes of the trust, the position appears to be that the section does not apply at all, and that there is thus no power of sale whether the liferenter consents or not. An alimentary beneficiary may consent,[1] and a *curator bonis* to a liferenter may obtain special power to consent.[2]

1397. When the authority of the Court is required, Lord Pearson held that the only safe, if not the necessary, procedure is to obtain the authority before any sale or purchase is made, and not to go to the Court for *ex post facto* approval of a transaction already agreed upon, even though made subject to the sanction of the Court being obtained;[3] but this does not appear to be supported by practice or by considerations of policy. Any power of sale possessed by trustees, however derived, may be exercised by public roup or private bargain.[4] Trustees holding a *pro indiviso* share may bring an action of division and sale though they have no power of sale.[5] A purchaser from trustees is not concerned with the application of the price.[6]

1398. In dispositions to trustees matters requiring special attention are—whether the trustees have power to purchase heritage, and the destination. There is no implied power to purchase,[6] and the 1921 Act does not confer it; the Court will in a proper case do so.[7] The title should be to the trustees and the survivors and survivor. A reference to successors in office will be omitted or inserted at pleasure; it may have a certain advantage in the completion of their title.

Subsection (8).—*Non-Scottish Trustees.*

1399. The Scottish Trusts Acts apply only to Scottish trustees, and English (or other) trustees can obtain no benefit from the provisions of, and can make no application under, those Acts. But on the basis of international comity the Court of Session *ex nobili officio* makes orders in favour of non-Scottish trustees, ancillary to orders already obtained from the Courts of the domicile of the trust.[8] The usual order of the latter Courts is to the effect that it is expedient that specified Scottish heritage should be sold, and directing the trustees to apply to the Scottish Courts. In that way an order may be obtained even for the sale of

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[1] *Charlton's Trs.*, 1901, 9 S.L.T. 130.
[2] *Cowan's C.B.*, 1902, 5 F. 19.
[3] *Hodge*, 1904, 11 S.L.T. 709.
[4] 1921, Act. s. 6.
[5] *Craig* v. *Fleming*, 1863, 1 M. 612.
[6] *Buchan* v. *Muirhead's Trs.*, 1901, 9 S.L.T. 24, where the rule was applied in a case of rectification of title.
[7] *Wardlaw's Trs.*, 1902, 10 S.L.T. 349; *Anderson's Trs.*, 1921 S.C. 315.
[8] *Pender's Trs.*, 1903, 5 F. 504.

Scottish heritage, against the sale of which there is a prohibition in the will or trust-deed.[1] The terms of the trust may be such that neither of those orders is required, *e.g.* if the will or trust-deed contains an express and unconditional power of sale; but great care is necessary in endeavouring to interpret and apply the language of a document, the meaning and effect of which are subject to foreign law.[2] Thus it is understood that under English law a general power of sale may be inoperative if the time has come for conveyance or distribution. The same need for care applies to suggestions that non-Scottish trustees have power of sale by statute, or by implication, according to the law of the domicile of the trust. Further, three matters must be kept in view, namely, (1) title; (2) power of sale; and (3) execution. As to this last it would seem to be necessary, or at least caution suggests, that the laws of both countries be observed, *e.g.* a majority of English trustees will not be accepted, nor attestation by one witness; and perhaps it is injudicious in such cases to send instructions for execution which bear that acknowledgment of the signatures to the witnesses is sufficient. But in the case of Scottish heritage, sealing is unnecessary even though required by the law of the domicile of the trust, or of the place of execution.

Subsection (9).—*Judicial Factors.*

1400. Judicial factors are trustees within s. 4 of the 1921 Act, and therefore they have the qualified implied power of sale thereby conferred.[5] But their appointment by itself cannot be used as a complete step in a title, and without a further judicial warrant they can neither record a notice of title nor pass on an unfeudalised title which the purchaser can use. They require a warrant from the Court to complete title, and the crave for this may now be scrutinised with reference to its effect on the exercise by the factor of the power which is purported to be conferred by s. 4 of the 1921 Act. A crave, also, for power of sale may be granted, or it may be refused on the merits, or the petition may be dismissed as unnecessary. It is known that prior to *Leslie's* case[3] a number of sales by judicial factors went through without judicial authority. In practically every case those transactions were no doubt carried out only after consulting the Accountant of Court. That fact furnishes a strong presumption—to put it no higher—that the sale was prudent in the whole circumstances of each case. Further, it is thought to be clear that, having regard to the terms of the 1921 Act, the dispositions are *ex facie* valid. It is accordingly unlikely that objections will be stated to those titles on subsequent dealings. The onus would lie on the objector.

1401. It is understood that as the result of *Leslie's* case agents of purchasers from judicial factors frequently stand out for either judicial

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[1] *Harris's Trs.*, 1919 S.C. 432.
[2] *Phipps* v. *Phipps' Tr.*, 1914, 1 S.L.T. 239.
[3] *Leslie's J.F.*, 1925 S.C. 464; *Marquess of Lothian's C.B.*, 1927, S.L.T. 419.

sanction of the sale or dismissal of such a petition as unnecessary.[1] Notwithstanding some of the views or suggestions in the opinions in *Leslie*, it is thought that such a general attitude is not justified. The purchaser's agent is entitled to know the facts, and in many cases he ought to be able to judge for himself that the sale is not at variance with the terms and purposes of the factory; this is stated on the assumption that there is evidence of the same view being taken by the Accountant. The suggestion here made is of more importance when an application for power to complete title is not required, for, when an application must, in any event, be presented to the Court, power of sale may conveniently also be craved. It can hardly be said that the position is improved by the result of the application in the *Marquess of Lothian's* case,[1] which was for power to feu; but notwithstanding that decision, it is still thought that in the great majority of cases no very great difficulty should be experienced. It is, however, another matter if it is proposed that the power to "sell," if granted, should be exercised in order to carry out a compromise, though power to compromise is also conferred by the Act.

Subsection (10).—*Trustee in Sequestration.*

1402. The trustee has power[2] to realise the estate belonging to the bankrupt wherever situated, and to convert the same into money, according to the directions given by the creditors at any meeting; and if no such directions are given, he shall do so with the advice of the commissioners. Sections 108 to 116 inclusive of the Bankruptcy Act have reference to the sale of the heritable estate. If a preferable heritable creditor with a power of sale proceeds to sell under his power, the trustee may concur "in order to fortify the title" (s. 108). If a preferable heritable creditor with a power of sale concur with the trustee in bringing the estate to sale, the trustee shall sell the same in his own name, and the articles of roup and conveyance to the purchaser shall be executed by the trustee, with consent of such creditor and the commissioners, and the price shall be paid by the purchaser to the parties legally entitled thereto; and in so far as not paid at the time of the delivery of the conveyance, it shall be consigned in the bank in which the money of the sequestrated estate is deposited; which payment or consignation of the price shall free and discharge the estate sold and the purchaser from the security of the consenting creditor whether the debt in such security be satisfied or not, and from all securities postponed to the security of such creditor (s. 109).

1403. In regard to clearing the record a sale in terms of s. 109 has the same effect as if it were a sale by the consenting creditor under his power of sale. It appears that this section cannot be applied by the trustee in co-operation with one or more *pari passu* creditors unless all the *pari*

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[1] Accountant's report on *Marquess of Lothian's* case, 1927 S.C. 579.
[2] Bankruptcy Act, 1913 (3 & 4 Geo. V. c. 20), s. 78.

passu creditors concur. If behind the bondholder there is an *ex facie* absolute disposition by the bankrupt, the section still applies, but there must be some evidence, good against the *ex facie* disponee, that he is truly an encumbrancer only. The concurring bondholder need not have made a statutory demand, but it is thought that he must be in a position to do so, *e.g.* his debt must be past due.

1404. Section 110 refers to sales by public roup by the trustee alone and entitles him in certain cases to prevent a heritable creditor proceeding with a sale under the power in the bond, namely, (1) if the creditors have resolved that the trustee shall sell "before a heritable creditor . . . shall have commenced proceedings for sale; or (2) if such proceedings, after being commenced prior to the date of such resolution have thereafter been unduly delayed." It is thought that service of a statutory demand under a bond is not commencing proceedings for sale. The trustee in turn must act with reasonable promptitude, and his upset price must be sufficient to pay the bondholder's whole claim.

1405. Section 111 authorises sale by private bargain with concurrence of (1) a majority of the creditors in number and value; (2) all the heritable creditors if any; and (3) the Accountant of Court. The Accountant has issued a memorandum on the subject; it is printed in the Parliament House Book, and reference is made to it. It will usually happen that there has been a definite offer. The trustee may go even further than negotiation, and may enter into a provisional contract of sale, but it must be contingent on the necessary consents being obtained. It is not said in the Act that there must be a valuation, but the Accountant requires that or other evidence of value. There is no enactment or rule that the market shall first have been tested by public roup or otherwise or as to advertising. It is not the official practice to require that a proposal for sale by private bargain shall have been preceded by attempts to sell by public roup.

1406. Cases occur in which the full value of two heritable properties can be obtained only by selling them in combination. In that case there may be difficulties regarding the apportionment of the price where different properties are charged with different bonds, and it will not be safe for the trustee to move till satisfied that the way is clear if a sale proceeds. In like manner there are cases when the wisest course is to dispose of buildings and goodwill, machinery and stock in one lot for a *cumulo* price, and there again the same kind of question arises and must be solved in advance.

1407. Section 111 (sale by private bargain), unlike s. 109, does not in terms require the consent of the commissioners. The Accountant's memorandum requires evidence of the commissioner's approval, but as a majority is a quorum it is not to be supposed that opposition by one would be fatal. Indeed as the commissioners exist only to represent the creditors, and as the sale of heritable property by private bargain is a matter which is by the Act referred to the creditors, it would appear to be the better opinion that, even if all the commissioners objected, that

would not be fatal. If the Accountant approved, it is to be assumed that the commissioners would sign the disposition. The Accountant issues evidence of his approval which can be put up with the title, but he does not sign the disposition.

1408. Section 111 requires the consent of "the heritable creditors if any" to the sale by private bargain. This means those holding securities over the particular property proposed to be sold. So taking it, the necessity for their consent is obvious, for without them the trustee cannot give a title by private bargain. Therefore it matters not whether they have or have not claimed in the sequestration; their consents are necessary. An inhibitor is not a heritable creditor in this sense; he makes his preference effectual in the sequestration, and so he comes into computation among the general creditors.

1409. The Act further requires for sale by private bargain the consent of "a majority in number and value of the ordinary creditors." Differing from the case of heritable creditors holding securities over the subject of sale, regard is here had only to those creditors who have lodged claims. (1) *Preferential Creditors, i.e.* creditors in debts of such kind or quality as to confer right to a preference within the sequestration. They must be included in the list of total creditors, and, if consenting, in the consenting list. Sec. 118 of the Act sets out five classes of preferential creditors, and there are others. That section allows formal claims to be dispensed with, but those creditors must have intimated claims in some form, and they go into the computations. (2) *Deferred Creditors.* It is thought that they also must go into the computation, though in one sense they are not ordinary creditors. (3) *Heritable Creditors, i.e.* on the property proposed to be sold. They may or may not have claimed in the sequestration. If not, they cannot go into the list of total creditors. If they have claimed, they must of course go in for any unsecured balance claimed, but it is thought further that they are to be reckoned for their whole debts (s. 55). (4) *Other secured Creditors*, if claiming in the sequestrations, are included in the computation for the balances for which they claim to vote. This refers to creditors holding securities over heritable property other than the subject of sale, or over any other part of the bankrupt's estate. (5) *Small Creditors.* No creditor whose debt is under £20 shall be reckoned in number, but his debt shall be computed in value (s. 96). (6) *The Purchaser.* If he happens to be a creditor, is he to be included in the list of creditors? It is understood that the question has never been raised, and it cannot arise unless a creditor is entitled to purchase on a sale by private bargain, a question dealt with below.

1410. Whenever and however the trustee may sell, s. 112 provides that he shall make up a scheme of ranking and division of the claims of the heritable and other creditors upon the price. The scheme is to be reported to the Court, questions may be raised on the merits, "and the judgment thereon shall be a warrant for payment out of the price against the purchaser." This does not mean that in every case the purchaser must wait for the Court's judgment before paying; the enactment is held

to have reference to cases where difficulty and competition occur. Payments made by the purchaser to the trustee in terms of the contract, though without judicial warrant, are good;[1] but if there are heritable creditors who do not consent to these payments, they will not be good as against these creditors except under s. 109 as above mentioned. *Somervell*[2] was an instance of the Act being followed in complicated circumstances; the price was consigned in the joint names of the trustee and the purchaser; the petition to the Court was by the trustee; and he and the bondholders were found entitled to expenses as between agent and client out of the fund.

1411. When any estate is sold publicly by virtue of this Act it shall be lawful for any creditor to purchase the same; but the trustee, or commissioners, or any law-agent employed by the trustee in connection with the sequestration, or any partner of such law-agent shall not be entitled to purchase (s. 116). A creditor may purchase when the sale is by the trustee with his consent, and in such circumstances that he might be said to be the true seller, *e.g.* when the price is less than his debt.[3] This covers cases under s. 109. As to law agency, the expression "law-agent in the sequestration" (in any case improper) is avoided in s. 116, and the prohibition in that section is wider. The section applies only to sales by auction, and it is understood that historically the reason for the permissive part of what is now s. 116 was to bar objections by outside parties, neither the bankrupt nor creditors, which of course could arise only on public sales.[3] It is understood that this view has throughout been acted on in the department of the Accountant of Court, and it was adhered to after special reconsideration on a recent challenge. On this view the section does not import a prohibition of purchase by private bargain by a creditor. As regards the disabilities expressly declared in the section, *quære* whether they are pleadable by third parties, not being the bankrupt or creditors.[4]

1412. Sequestration supersedes any trust-deed, but on the point of title a conveyance by the trustee under the trust-deed, or at least his consent, should be required, because he cannot be compelled to denude unless and until he is recouped his outlays and relieved of obligations.[5] In like manner a point of strict title arises where the sequestrated estate is that of a firm, and the property was, as it always is, vested in trustees for the firm.[6]

SUBSECTION (11).—*Trustees in Non-Scottish Bankruptcies.*

1413. The Scottish Courts fully adopt the principle of the universal character of the concourse and distribution in bankruptcy. So far as this rests on common law, or general principle, or extra-territorial legislation,

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[1] *Callum* v. *Goldie*, 1885, 12 R. 1137.
[2] *Somervell's Tr.* v. *Somervell*, 1909 S.C. 1125.
[3] *Lindsay & Crookston* v. *Rae*, 1897, 13 S.L. Rev. 296 (personal estate).
[4] *Wishart* v. *Howatson*, 1897, 5 S.L.T. 84; *Wright* v. *Buchanan*, 1917 S.C. 73.
[5] *Salaman* v. *Rosslyn's Trs.*, 1900, 3 F. 298.
[6] Bell, Com. ii. 565.

it has been laid down that it is limited to moveable estate,[1] but that cannot now be absolutely accepted.[2] As regards both heritable and moveable estate, the principle may, however, be excluded or qualified by the legislation under which the foreign bankruptcy proceeds, or by the terms of the foreign award in any particular bankruptcy.

(i) *England.*

1414. The title of a trustee in an English bankruptcy (including that of the official receiver while acting as trustee) extends to the bankrupt's property, real or personal, whether in England or elsewhere.[3] The certificate of the trustee's appointment is deemed to be a conveyance for the purposes of any law in force in any part of the British dominions requiring recording, and the certificate may be recorded accordingly (s. 53). The steps suggested are—(1) The production and registration in the bill chamber of the order of adjudication and the order of appointment of the trustee (C.A.S., E, iv.); (2) the recording of those two orders, with the bill chamber certificates thereon, in the register of inhibitions and adjudications; (3) the recording of the order of appointment in the register or registers of sasines with a warrant of registration applicable to the county or counties, burgh or burghs, in which it is believed that the bankrupt's heritable property is situated; and (4) the recording in the same sasine registers of notices of title applicable to the known properties. The trustee has power of sale by public auction or private contract, and he can sell or convey without any consent (s. 55). Special rules apply to the case of mortgaged property.[4] The trustee has not the benefit of the sections in the Scottish Bankruptcy Act, enabling the trustee in a Scottish sequestration to sell with consent of a bondholder and so to clear the property of postponed securities, and to sell without consent of inhibitors. *Quære* as to poindings of the ground. Nor has the trustee the benefit of s. 100 of the Scottish Act, enabling a Scottish trustee to convey without completing title, though s. 3 of the Conveyancing Act, 1924, applies (s. 5 (1)). It may be serious if the bankrupt's title is completed in the bankruptcy (Scottish Act, s. 100).

(ii) *Ireland.*

1415. It is understood that the position in an Irish bankruptcy with reference to heritage in Scotland is very much the same as is stated in the preceding paragraph. C.A.S., E, iv., expressly applies to Ireland. The Irish Court fully recognises comity, at least within the Empire.[5]

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[1] *Goetze* v. *Aders*, 1874, 2 R. 150; Goudy, p. 599; *Home's Tr.* v. *Home's Trs.*, 1926, S.L.T. 214.

[2] *Araya* v. *Coghill*, 1921 S.C. 462; para. 1417, *infra.*

[3] Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), ss. 38, 167.

[4] *Ibid.*, 2nd Sched. 10 *et seq.*

[5] *In re Bolton*, [1920] 2 I.R. 324 (Irish real estate brought under a South African bankruptcy).

(iii) *The Empire.*

1416. The principle of comity is laid down as statute law for the Empire in the English Bankruptcy Act, 1914,[1] and to the same effect as if that enactment had been contained in a Scottish Bankruptcy Act. C.A.S., E, iv., is limited to the United Kingdom. Reference may be made to the case of *Bolton* cited above.[2] Nevertheless, experience has shewn that there may be at least a question whether bankruptcy awards made even in British dominions may not suffer geographical limitations, as regards even moveable property, by the terms of the local legislation or the terms of particular awards.

(iv) *Foreign.*

1417. *Araya's* case[3] shews that a purely foreign award may reach Scottish heritage, and it also exemplifies the machinery and official precautions. The Court granted warrant to the foreign trustee to complete title, but it was subsequently stated that that did not amount to a conveyance and could not be used as such; that conveyancing principles must be regarded; and the solution was found in the appointment of a judicial factor, ancillary to the foreign administration, but subject to the orders of the Court here, and without prejudice to the question of a preference to United Kingdom creditors upon the proceeds of sale of the Scottish assets. The authority to complete title, even in such a case, might now operate as a conveyance if the requirements of the 1924 Act, s. 5 (3), were observed. The preference of local unsecured creditors is insisted on in most foreign countries; as regards Scotland it was not decided in *Araya*,[3] being ultimately conceded because those claims were of trifling amount.

Subsection (12).—*Companies in Liquidation.*

1418. In a liquidation by the Court the official liquidator has power to sell by public roup or private bargain (Companies Consolidation Act, 1908,[4] s. 151 (2)), but he requires the sanction of the Court unless the Court has declared that he may exercise the power of sale, or all his powers, without the sanction or intervention of the Court (s. 151 (4)). The liquidator has the same powers as a trustee in bankruptcy (s. 151 (6)). In a voluntary liquidation the liquidator has the same power without the sanction of the Court (s. 186 (4)). In a liquidation subject to supervision, the liquidators may "subject to any restrictions imposed by the Court, exercise all their powers without the sanction or intervention of the Court in the same manner as if the company were being wound up altogether voluntarily"

[1] 4 & 5 Geo. V. c. 59, s. 122.
[2] *In re Bolton*, [1920] 2 I.R. 324.
[3] *Araya* v. *Coghill*, 1921 S.C. 462.
[4] 8 Edw. VII. c. 69.

(s. 203). In no form of liquidation is it necessary for the liquidator to make up any title, assuming that the title of the company has been completed. The disposition runs in name of the company in liquidation and the liquidator. The execution is the signature of the liquidator and the affixing of the company's seal (s. 151 (2) (*b*)). Secs. 108 to 113 and 116 of the Bankruptcy (Scotland) Act, 1913, so far as is consistent with the Companies Act, apply to the realisation in liquidations by or under the supervision of the Court of heritable property affected by securities (1908 Act, s. 213).

1419. Under the Companies Bill at present before Parliament, following on the Report of the Company Law Amendment Committee, it is intended to make the following changes relevant to the matters now under consideration—(1) That in a judicial winding-up the liquidator's powers of realisation may be exercised without the sanction of the Court; and (2) that in any form of liquidation there may be a committee of inspection, which shall have the powers and duties of the commissioners in a sequestration. The committee may act by a majority present at a meeting, but shall not act unless a majority are present. The intended Act is not to apply to Northern Ireland.

Subsection (13).—*Non-Scottish Liquidations.*

(i) *England and Northern Ireland.*

1420. The fact that the Companies Acts regulate companies registered in any of the three kingdoms has an important bearing on the powers of liquidators in English and Irish liquidations with reference to heritage in Scotland belonging to the company. No completion of title in the name of the company is required, but it is competent. Power of sale by public auction or private bargain is in all cases vested in the liquidator without the consent in English cases, but only with consent of the liquidation Court in Irish compulsory liquidations (1908 Act, s. 151 (2) and s. 186) unless the Court imposes restrictions (s. 203). The liquidator has not the benefit of s. 151 (6) and s. 213, which are limited to Scottish liquidations. The procedure laid down in C.A.S., E, iv., applies in English and Irish liquidations.

(ii) *Dominion and Foreign Liquidations.*

1421. The principle of unified administration applied in bankruptcy does not necessarily extend to company liquidations,[1] and there may be separate liquidations in different countries. It does not appear that the provision in s. 25 of the Titles to Land Consolidation Act, 1868, for liquidators completing a recorded title is necessarily limited to liquidators appointed in the United Kingdom.

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[1] *Queensland Mercantile and Agency Co., Ltd.* v. *Australasian Investment Co., Ltd.*, 1888, 15 R. 935.

SUBSECTION (14).—*Disposition to Superior.*

1422. If a superior purchases from the vassal the *dominium utile*, he requires to obtain a conveyance of it, and when he succeeds as heir to his vassal he requires to make up a title to the property in one of the ways competent to an heir.[1] Even after it became the practice for a superior who purchased the property to obtain a disposition in his favour, and for a superior who succeeded as heir to the property to make up a title to it as heir, there remained a doubt whether, when a person made up separate titles to the superiority and the property respectively of the same lands, consolidation of the two fees did not operate *ipso jure*. It is now settled that consolidation does not take place *ipso jure* in such a case.[2] Since the commencement of the Conveyancing Act, 1874, the practice has been, in the case of a superior's purchasing the *dominium utile* held of him, to obtain from his vassal a disposition in the same form as if he were a stranger to the feu, and to take infeftment under it, and then, his titles to the property and the superiority being complete, to record a minute of consolidation in the form of Schedule (C) annexed to the Act, with a warrant of registration in his favour, in the appropriate Register of Sasines (s. 6); and this method of consolidation is the one also adopted in practice by a vassal who acquires by purchase or succession the superiority of his lands.

1423. Though the method of consolidation above mentioned is the one which has been most generally followed since 1874, the better opinion seems to be that nothing contained in the Act of that year prevents a superior who purchases the property fee from having inserted a procuratory or clause of resignation *ad remanentiam* in the disposition in his favour, and from taking infeftment under it.[3] Such infeftment would, it is thought, since 1874, give him a valid title to the property, and operate consolidation of the two fees; and it is also thought that, after completing separate titles to the superiority and the property, the owner of them may, instead of recording a minute of consolidation in the form of Schedule (C) of the Act of 1874, consolidate them by recording with a warrant of registration in his favour, a procuratory of resignation *ad remanentiam*. (See CONSOLIDATION.) The Conveyancing Act, 1924, provides (s. 11) that an infeft superior acquiring the estate of property may in the disposition in his favour insert a clause of resignation *ad perpetuam remanentiam*, and when recorded it operates consolidation. The enactment is retrospective.

SUBSECTION (15).—*Dispositions under Presumption of Life Limitation Act*, 1891.[4]

1424. When one of two or more *pro indiviso* proprietors has disappeared for seven years, the other or others may with the authority of the Court

[1] *Morton*, 1668, Mor. 6917.
[2] *Bald* v. *Buchanan*, 1786, affd. 1787, Mor. 15084; 2 Ross's L.C. 210, 230.
[3] See *Lord Macdonald's Curator*, 1924 S.C. 163.
[4] 54 & 55 Vict. c. 29.

grant a disposition of the property without any concurrence on behalf of the absent person.[1] This appears to be limited to cases where one only of the proprietors is absent and unheard of for seven years, and, where the other or both or all the others are competent and willing to sell. The life or death of the absent person is not material. There will be no judicial finding that he is to be presumed to be dead. The petition should aver who is or may be the heir if he be dead, and service should be asked on the heir. An alternative is a petition by the heir under s. 3 and the completion of his title, thus rendering procedure under s. 4 unnecessary. Under s. 4 the sale may be by private bargain if the Court so authorise.

1425. It does not appear that the petitioner or petitioners are entitled to receive the share of the price falling to the absent owner even in a question with the purchaser. It is recommended that the decree of Court should (1) find that the absent person has disappeared and has not been heard of for seven years or upwards; (2) fix the upset or minimum price; (3) specify the extent of advertising; (4) ordain the purchaser to deposit in a specified bank the absent person's share for his behoof, and to lodge the deposit receipt in process; and (5) contain findings towards ascertaining the net amount of the share, *e.g.* the deduction of a share of expenses including the expenses of the petition, death duty, and casualty if any.

1426. The Act says that the disposition "shall be as good and valid to the purchaser as if the absent person had been a party." The title of the absent person will be transferred *tantum et tale*, and there is no authority in the Act for making up his title if incomplete, but having obtained authority under s. 4 the petitioners could compel delivery to them, for the purpose of the sale, of the writs applicable to the absent person's share, unless subject to lien. There is nothing in the section to enable a title to be given as against even an inhibitor. Nor does there appear to be anything to authorise the Court to give the petitioners power to arrange for discharges, and to settle with creditors out of the absent person's share of the price. If, however, the Court will deal with these matters in the decree the purchaser will no doubt act on it, taking assignations of bonds paid off. If the matter is not dealt with in the decree the title is defective. In any case the purchaser ought to preserve a statement bringing out the deposited sum, with vouchers, and a copy of the bank deposit receipt. There is no power expressed to bind the absent owner in warrandice or relief from casualties, etc., but both may be implied.

SUBSECTION (16).—*Dispositions to Survivors.*

1427. Experience shews that destinations to survivors in dispositions are apt to raise difficulties. Assuming that the words occur in an *inter vivos* disposition it is recommended that the disponees should sign in order to testify to their knowledge of the destination, and that it has been inserted by their direction when that is the case. Such destina-

[1] 54 & 55 Vict. c. 29, s. 4.

tions receive different constructions according to circumstances, and especially the presence or absence of mutuality and contract. The most important question is whether each of the disponees has power of alteration or revocation; and, if so, to what extent, that is to say, whether as to both liferent and fee; and whether both *inter vivos* and *mortis causa*; and as to the effect of a general disposition *mortis causa* as a means of exercising a power of disposal.

1428. The simplest case is a disposition to A. and B. equally between them, and the survivor of them, and their respective assignees, and the heirs of the survivor. A destination in these terms puts their shares at the absolute disposal, *inter vivos* or *mortis causa*, of each *pro indiviso* proprietor, subject to his debts. It also leaves the usual question whether the shares are carried by subsequent general wills or pass under the survivorship. Even if there be a contractual element as mentioned below, which would bar *mortis causa* disposal by the predeceaser, such a destination will still leave the respective shares subject to the debts and deeds of each *pro indiviso* proprietor.

1429. It may be preferred to have a form which shall furnish its own interpretation by stating the results expressly. The form may then run "to A. and B. equally between them as *pro indiviso* proprietors with full power to each, *inter vivos* and *mortis causa*, to dispose of or otherwise deal with his one-half *pro indiviso* share, and failing or subject to the acts and deeds of the predeceaser as regards his one-half *pro indiviso* share, to the survivor and his heirs and assignees whomsoever." It is understood that this has the same effects as stated in the immediately preceding paragraph, with the difference that they are expressed instead of being implied.

1430. The idea of express guidance may be sought to be carried further so as to aid in the solution of the question of whether or not a testamentary power has been exercised, or to prevent that question arising in certain circumstances. To this end the destination may run "to A. and B. equally between them, with full power to each, *inter vivos* and *mortis causa*, to dispose of or otherwise deal with his one-half *pro indiviso* share, but declaring that no *mortis causa* writing shall be deemed an exercise of the power or to affect the granter's share of the said subjects unless it bears specific reference to these presents or to the said subjects, and failing or subject to the acts and deeds of the predeceaser as aforesaid, then to the survivor and his heirs and assignees whomsoever." Under such a destination each party's share is liable for its owner's debts and subject to his *inter vivos* deeds. It is also subject to testamentary disposal by each, but that testamentary power will not take effect unless the intention to exercise it is specifically expressed in the will. It is unlikely that that expression would be found in any will made prior to the creation of the destination, so that the power of testamentary disposal would be exercisable only by testamentary writings later in date, and only if the intention be declared. Further, it is thought that the words suggested in the above form will not be satisfied by any general language in the will, such as a reference to all

property held under special destinations, or property at the testator's disposal, but that there must be actual mention of the particular property or of the deed containing the declaration.

1431. The element of contract, though not expressed,[1] may be judicially inferred, but it may be desired to let it also rest firmly on express statement in the disposition. Assuming that A. and B. are purchasing and providing the price equally, the disposition may contain a recital that the price has been contributed by them in equal shares in consideration of a contractual arrangement between them that the title should be taken with the destination therein expressed, and that the destination has been dictated by them in execution of that contract. The destination will then be "to A. and B., equally between them, and to the survivor of them and to the heirs and assignees of the survivor, under the declaration that in respect of the joint and contractual provision of the price it shall not be in the power of either of them by any *mortis causa* writing to revoke, alter, or affect the destination to the survivor." This will effectually prevent alteration of the destination. To that end it is not essential that each shall have contributed exactly one-half of the price, or that the property shall have been vested in them in the proportions in which they did provide the price. The share vested in each, however, will be liable to that party's debts and subject to his *inter vivos* deeds.

1432. It may be that all that is desired is to protect the survivor's liferent of the predeceaser's one-half against revocation whether *mortis causa* or *inter vivos*. In that case there may be a narrative as above, and the destination may be "to A. and B. equally between them and the survivor in liferent," under a declaration that "the destination to the survivor in liferent shall not be affectable by the predeceaser's debts or deeds *inter vivos* or *mortis causa*, and subject thereto, to the disponees equally between them in fee, with full power to each *inter vivos* or *mortis causa* to dispose of or otherwise deal with his one-half *pro indiviso* share of the fee without prejudice always to the survivorship liferent, and failing or subject to the acts and deeds of the predeceaser as regards his one-half of the fee, to the survivor and his heirs and assignees whomsoever in fee."

Section 9.—Assignations of Personal Titles and Rights to Land.

Subsection (1).—*Classification and Distinctions.*

1433. A person may have, as opposed to a feudalised title to lands, (1) a personal title or right; (2) a personal right in the sense of s. 9 of the Conveyancing Act, 1874; or (3) a right (*jus crediti*) to demand a conveyance of lands from the person who has a title, feudalised or unfeudalised.

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[1] *Perrett's Trs.* v. *Perrett*, 1909 S.C. 522; *Chalmers' Trs.* v. *Thomson's Exrx.*, 1923 S.C. 271.

Thus A., infeft, may grant and deliver a disposition of lands to B. Before B. takes infeftment he is said to have, in virtue of the disposition in his favour, a personal title to the lands, and this personal title he can transfer by granting an assignation. By the Conveyancing Act, 1874, it is declared that a personal right to every estate in land descendible to heirs (*i.e.* to heirs-at-law or of provision) [1] shall, without service or other procedure, vest or be held to have vested in the heir entitled to succeed thereto by his survivance of the person to whom he is entitled to succeed, and that such a personal right vested in an heir is transmissible in the same manner as a personal right to land under an unfeudalised conveyance (s. 9). But although a personal right vested in an heir is so transmissible, yet the assignee of it must, before completing a feudal title to the lands carried by the assignation in his favour, present a petition under s. 10 of the Act of 1874. Again, one may have neither a personal title nor a personal right in the sense of s. 9 of the Act of 1874, and yet may have a right to call on, *e.g.*, a trustee to grant a conveyance of lands which a truster has ordained to be conveyed to him. This right is usually called a *jus crediti*, and an assignation can be granted of it, the assignee's title to the *jus crediti* being completed by intimation of the assignation to the person under obligation to grant the conveyance. From a conveyancing point of view, there is this essential difference between an assignation of a personal title or a personal right in the sense of the Act of 1874, on the one hand, and an assignation of a *jus crediti* on the other, that if a personal title, or a personal right in an heir, is assigned separately to two or more persons, the assignee who first takes infeftment excludes the other assignees; [2] but if a *jus crediti* is so assigned, the assignee who first intimates his assignation is preferred.

Subsection (2).—*Transference of Personal Title to Lands under Unfeudalised Conveyances.*

1434. Though before 1845 a person having a personal title to lands could transfer it by a simple assignation of the unexecuted executive clauses contained in—*e.g.* to take the typical case—a disposition in his own favour, the usual form for transferring this personal right was then, and continued to be, until 1858, a deed called a disposition and assignation. It was similar to the ordinary disposition then in use, with these exceptions: that it did not contain a procuratory of resignation, or a precept of sasine, and that it contained an addition to the ordinary clause of assignation of writs to the effect that the disposition containing the open or unexecuted executive clauses—*i.e.* the procuratory of resignation and precept of sasine—was also assigned. The substance of the deed was the assignation in favour of the grantee of the unexecuted warrants to which the granter had right. The grantee under the deed could make up a title either by confirmation or by resignation—*i.e.* before 1845 he could

[1] *M'Adam* v. *M'Adam*, 1879, 6 R. 1256.
[2] *Renton* v. *Anstruther*, 1837, 16 S. 184; affd. 1843, 2 Bell's App. 214; 2 Ross's L.C. 435.

take base infeftment on the precept of sasine assigned to him, and then get a charter of confirmation in his favour, or, in virtue of the procuratory assigned to him, get a charter of resignation, or it might be a charter of resignation and confirmation, and then take infeftment on the precept of sasine in the charter. The Act of 1845 made no change in the form of the disposition and assignation, but abolished instruments of resignation *in favorem*, allowed the deduction of title required by the Act 1693, c. 35, to be made in the charter of resignation, abolished the need for symbolical delivery in taking infeftment, and introduced a form of instrument of sasine which could be recorded at any time during the life of the person in whose favour it was expede.

1435. Owing to the provisions of the Lands Transference Act, 1847, the clauses of the disposition and assignation were in practice shortened, and the arrangement of them to some extent altered. After that Act the clauses of the disposition and assignation were: (1) Narrative; (2) dispositive; (3) term of entry; (4) obligation to infeft; (5) assignation of writs; (6) assignation of rents; (7) obligation of relief; (8) warrandice; (9) registration; (10) testing clause. The Act of 1847 declared that a clause of assignation of writs in the form "And I assign the writs" should import an unconditional assignation, *inter alia*, to all open procuratories and precepts to which the disponer had right (s. 3), and thereafter it was deemed unnecessary to insert in the clause of assignation of writs any special assignation of the disposition in favour of the disponer or the unexecuted executive clauses therein.

1436. As already stated, it was competent even before the Titles to Land Act, 1858, to transfer a personal title to land by a simple assignation of the unexecuted executive clauses to which the cedent had right. This was settled by the case of *Renton*,[1] where it was held, *inter alia*, that an unexecuted procuratory of resignation might be as effectually carried by a general assignation of writs, titles, and evidents (where there was nothing in the deed containing it to exclude such a construction) as if specifically mentioned or described, and that the deed of assignation did not require to contain dispositive words, or profess directly to convey or make over the property of the lands themselves. Notwithstanding this decision, conveyancers were in the habit of using the disposition and assignation for transferring personal titles to lands at least until 1858, when the Titles to Land Act of that year gave sanction to the use of an assignation, instead of the disposition and assignation. By that Act it was made competent to any party in right of an unrecorded "conveyance" to assign the conveyance in forms prescribed by the Act, the assignation being either written on the conveyance assigned or apart from it (ss. 13 and 14). The provisions of this Act—which were extended to the transfer of unrecorded conveyances of subjects held burgage by the Titles to Land Act, 1860[2]—did not, however, abolish the use of the

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[1] *Renton* v. *Anstruther*, 1837, 16 S. 184; affd. 1843, 2 Bell's App. 214.
[2] 23 & 24 Vict. c. 143.

disposition and assignation. Its provisions were repeated with additions by the Titles to Land Consolidation Act, 1868.

1437. The 1924 Act has two different sets of provisions which affect assignations of personal titles in the sense above explained. In the first place, it prescribes very simple forms of assignations of unrecorded conveyances, which may be endorsed or written separately; there may be a series of these; if separate they may relate to the whole or only to part of the property in the unrecorded conveyance, but if endorsed they must apply to the whole; and there are also introduced somewhat complicated methods or alternative methods of obtaining infeftment. But, in the second place, by making it competent for the holder of an unrecorded title to grant a disposition which shall be a warrant for *de plano* infeftment of the disponee,[1] the 1924 Act has very greatly diminished the importance of this whole branch of the subject.

Subsection (3).—*Assignations of* Jura crediti *to Lands.*

1438. Where a trustee holds lands under an obligation to convey them to a beneficiary, or where a person buys heritage, *e.g.* by missives, or where a person comes under an obligation to convey lands to another, the beneficiary, the buyer, or the obligee respectively, is said to have a *jus crediti* to the lands; or, in other words, while he has a right to insist on a conveyance of the lands in his favour, he cannot complete a real right, *i.e.* a feudal title, to them "without the aid either of a third party or of the Court as fulfilling an obligation incumbent on such third party" [2] These *jura crediti* are effectually transferred by assignations intimated to the obligors in the obligations which constitute them. As matter of practice, dispositive words are generally used in transferring a *jus crediti* to land, but it is thought that, as a personal title to land under an unfeudalised conveyance could be before 1874, and can still be, assigned without the use of any particular words, so a deed transferring a *jus crediti* to lands did not before 1874, as it certainly does not now, require to contain disponing words. On the other hand, if the holder of a *jus crediti* to lands grants a conveyance of them, as if he were infeft in them, it will receive effect as an assignation of his *jus crediti*.[3] When such a deed is intimated, the cedent is divested without the necessity of recording in the register of sasines. The intimation entitles the assignee to rank preferably to subsequent adjudging creditors.[4] But as the assignation does not communicate to the assignee a right capable of being completed by infeftment, he, to get a feudal title in the lands, requires to obtain a conveyance from the person who holds them under obligation to denude, or, in the event of his being unable to obtain a conveyance, to adjudge them.

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[1] Para 1370, *supra*.

[2] Bell, Convey. ii. 771.

[3] See *Paul* v. *Boyd's Trs.*, 1835, 13 S. 818.

[4] *Russell* v. *M'Dowall & Selkrig*, 6th Feb. 1824, F.C.; *Morrice* v. *Sprot*, 1846, 8 D. 918, and on intimation see *Paul, supra*; *Tod's Trs.* v. *Wilson*, 1869, 7 M. 1100; *Campbell's Trs.* v. *Whyte*, 1884, 11 R. 1078; *Jameson* v. *Sharp*, 1887, 14 R. 643.

1439. It must now be considered as settled that heritable property [1] and incorporeal personal rights [2] affected by a latent trust, though vested in a bankrupt by a title *ex facie* absolute, do not pass to the trustee in his sequestration; but a personal obligation to convey heritable estate undertaken by one who is the beneficial as well as the feudal owner does not denude him of his beneficial interest, or confer upon the person with whom it was contracted either the character or the rights of a trust beneficiary.[3] Thus, suppose A. by missives sells lands to B., and thereafter, before B. obtains a conveyance, A. is sequestrated, the lands vest in A.'s trustee. But, on the other hand, if A. has a *jus crediti* to lands, and he assigns it to B. by intimated assignation, the lands or the *jus crediti* will not vest on A.'s bankruptcy in his trustee. Under articles of roup, which contained the usual obligation on the exposer to dispone to the purchaser, B. feued lands from the exposer A., who executed a charter in B.'s favour. The lands, after various transmissions, came into the hands of N., who, after infeftment in them, granted a bond and disposition in security in favour of O. and P., who recorded it in the Register of Sasines. N. thereafter became bankrupt, and the trustee on his sequestrated estate, having discovered that, owing to defects in the charter in favour of B., no real right in the feu had ever been constituted, sued the successors of the exposer, A., to grant a valid charter in his favour as trustee. O. and P., the creditors under the bond, maintained that their right to the lands under the bond in their favour was preferable to that of N.'s trustee, and the judgment of the Court of Session and of the House of Lords was that the trustee could not obtain a charter except under burden of the bondholders O. and P.'s preferable right, in respect (1) that under the articles of roup and the charter, the bankrupt had a *jus obligationis* or *jus crediti* to obtain a personal title to the lands in a form admitting of its being feudalised by infeftment; (2) that this *jus obligationis* or *jus crediti* was carried by the assignation of writs in the bond and disposition in security granted by N. in favour of O. and P.; and (3) that the registration of the bond in the Register of Sasines was equivalent to intimation of that assignation to the exposer, A., or his successors.[4]

1440. In *Edmond's* case in the House of Lords Lord Cranworth,[5] in discussing whether the right of the bankrupt was a *jus ad rem* or a *jus crediti*, remarked: "I must confess that upon this subject I think there is a great deal of doubt and obscurity, from the want of anything definitely explaining the distinction between *jus ad rem* and *jus crediti*, because I think I find that these words have been used in many cases

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[1] *Heritable Reversionary Co., Ltd.* v. *Millar*, 1891, 18 R. 1166; rev. 1892, 19 R. (H.L.) 43.

[2] *Ibid.*; *Dingwall* v. *M'Combie*, 1822, 1 S. 463; *Gordon* v. *Cheyne*, 1824, 2 S. 675.

[3] See Lord Watson in *Heritable Reversionary Co., Ltd.*, 19 R. (H.L.) at p. 51.

[4] *Edmond* v. *Mags. of Aberdeen*, 1855, 18 D. 47; affd. 1858, 3 Macq. 116; cf. *Strachan* v. *Whiteford*, 1776, Mor. App. "Adjudication," No. 7; 2 Ross's L.C. 480, and *Macgregor* v. *Macdonald*, 1843, 5 D. 888; 2 Ross's L.C. 489, as commented on in *Watson* v. *Wilson*, 1868, 6 M. 258.

[5] 3 Macq. at p. 122.

interchangeably, without any clear distinction of the one from the other; but there may be this practical distinction, that the *jus ad rem* is a right which the person possessing it may make a complete right by his own act, or by some act which he may compel another without a suit to perform; whereas a *jus crediti* may be defined to be a right which the holder of it cannot make available, if it is resisted, without a suit to compel persons to do something else in order to make the right perfect. Either, therefore, I think there is no distinction between the two things, or, if there is a distinction, it is within the latter description, that of *jus crediti*, that this case comes, and neither Nicol" (*i.e.* the bankrupt) "nor the bondholders could have obtained a valid feudal infeftment under any existing charter."

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